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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

Nos. 795 and 796.

JESSE C. ADKINS, ET AL., CONSTITUTING THE MINIMUM WAGE BOARD OF THE DISTRICT OF COLUMBIA,

Appellants,

vs.

THE CHILDREN'S HOSPITAL OF THE DISTRICT OF COLUMBIA, A CORPORATION.

JESSE C. ADKINS, ET AL., CONSTITUTING THE MINIMUM WAGE BOARD OF THE DISTRICT OF COLUMBIA,

Appellants,

vs.

WILLIE A. LYONS.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASES.

These cases come to this Court on appeal from final orders of the Court of Appeals of the District of Columbia, affirming decrees of the Supreme Court of the District holding unconstitutional the District of Columbia Minimum Wage Law (Act of September 19, 1918, ch. 174, 40 Stat. L. 960) and enjoining the en-

forcement of an order of the Minimum Wage Board of March 26, 1920 (made under authority of the statute), providing that no person, firm, association or corporation should employ a woman in any hotel, lodging house, apartment house, club, restaurant, cafeteria or hospital, at wages less than those fixed by the Board.

The cases present the question of the constitutional validity of the District of Columbia Minimum Wage Law. That law, passed September 19, 1918, establishes a board, composed of three members appointed by the Commissioners of the District, to be known as "Minimum Wage Board." The Board is given authority to ascertain the wages paid to women and minors in different occupations in the District of Columbia, to examine the books of any employer of women or minors, and to require of such employer a full statement of such wages paid; it is authorized to declare (a) standards of minimum wages for women in any capacity and what wages are adequate to supply the cost of living and (b) standards of minimum wages for minors in any occupation and what wages are unreasonably low. The Board is given power, after certain investigations, conferences with persons appointed by it and hearings by the Board, to fix wages for women employees in any occupation in the District of Columbia where the Board is of the opinion that any substantial number of women workers are

receiving "inadequate" wages, and also to fix "piece rates" where women are being paid by the piece.

After such order of the Board fixing wages or piece rates in any occupation takes effect, it becomes a criminal offense by the provisions of the law, punishable by fine or imprisonment, or both fine and imprisonment, for any employer or any agent, director or officer of any corporation employer to pay any woman employee in such occupation any less wages than those fixed by the Board, or otherwise to violate the Act with reference to wages. And any employer is also made liable in a civil action to any woman employee for the full amount of the wage fixed less the amount actually paid, and any agreement for a less wage is no defense to the action. Prosecutions are to be on information filed in the police court by the Corporation Counsel.

The decision of the Board fixing wages is made final, and there is "no appeal from the decision of the Board on any question of fact", but an error of law embodied in any ruling of the Board may be reviewed by a court. The law further provides punishment of any employer or his agent who either "discharges or in any manner discriminates against any employee because such employee has served or is about to serve on any conference or has testified or is about to testify, or because such employer believes that said employee may serve

on any conference or may testify in any investigation or proceeding under or relative'' to the Act.

The law provides that it shall be known as the ''District of Columbia Minimum Wage Law'' and that its purposes are to protect women and minors of the District from conditions detrimental to their health and morals. (See Appendix A of this Brief.)

(By separate provision the Board is authorized to inquire into the wages of minors and ''determine suitable wages for them'', but with these provisions we are not here concerned because the power to regulate contracts of minors stands on a different footing.)

The bill of complaint filed in the Supreme Court of the District of Columbia by the Children's Hospital recites that the Minimum Wage Board, purporting to act under the statute, issued on March 26, 1920, an order providing in substance that no person or corporation should employ a woman or minor girl in any hotel, lodging house, apartment house, club, restaurant, cafeteria, or other place where food is sold to be consumed on the premises, or at any hospital, at a rate of wages less than 34½ cents per hour, $16.50 per week, or $71.50 per month, and that when meals are furnished by any employer not more than 30 cents per meal may be deducted by such employer from the weekly wage in computing the minimum, and in case lodging is furnished not more than $2.00 per week

shall be so deducted, and tips and gratuities are not to be construed as part of the minimum wage. The order is alleged to be effective 60 days from date, or May 26, 1920. It further recites that the plaintiff is a corporation engaged in conducting a hospital for children in the District of Columbia and that it employs a number of women—scrubwomen, washerwomen, attendants, etc.—at less than the minimum wage fixed by the order; that this employment is under agreements voluntarily made with the employees, and that the employees are satisfied with the wages and desire to continue with the work, but that the Minimum Wage Board is required by the Act and threatens to prosecute the plaintiff for continuing to employ women over 18 years of age at less than the minimum wage; that the plaintiff will be subjected to a multitude of criminal prosecutions and the work conducted at the hospital will be seriously interfered with before it can secure a judicial determination of the validity of the statute and order, and the plaintiff asks for an injunction to restrain the Board from such prosecution, on the ground that the law under which the Board is acting is unconstitutional, in that it deprives plaintiff of liberty and property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States. (Rec., p. 2.)

The bill of complaint filed by Willie A. Lyons recites the same order of the Minimum Wage Board and that the plaintiff is a woman of the age of 21 years and was on the 25th day of May, and for some months prior thereto, employed by the Congress Hall Hotel Company as an elevator operator and received a salary of $35.00 a month and two meals a day, in compensation for her services; that this employment was under an agreement made by her with the said Hotel Company; that she is willing to resume and continue her services at the same wages, and that the said Hotel Company was entirely satisfied with the services, and is ready and willing to resume and continue her in the said employment at the same wages, but that she was advised that the Hotel Company would be compelled to dispense with her services on May 26, 1920, by reason of the said order of the Minimum Wage Board; that the amount paid for her services was less than the amount required by the said order; that the Minimum Wage Board is required by the Act and threatens to prosecute the said Hotel Company for resuming the employment of the plaintiff for less than the minimum wage; and that the Act and order referred to deny to said Hotel Company its freedom of contract with the plaintiff and denies the right of the plaintiff to work for whom and at such wages as she pleases; and asks for an injunction to

restrain the Board from such prosecution on the ground that the law under which the Board is acting is unconstitutional in that it deprives the plaintiff of liberty and property without due process of law in contravention of the Fifth Amendment to the Constitution. (Rec., p. 18.)

Plaintiff below in each case secured a rule to show cause why the defendants should not be enjoined and restrained as prayed in the bills of complaint. (Rec., pp. 8, 24.) Defendants filed answers to the rules to show cause and motions to dismiss the bills of complaint. The Court entered decrees discharging the rules to show cause, denying the applications for preliminary injunctions, and dismissing the bills. (Rec., pp. 13, 26.)

On appeal to the Court of Appeals, that Court after hearing and rehearing entered orders reversing the decrees of the Supreme Court of the District and remanding the cases for further proceedings in accordance with the opinion of the Court of Appeals in the two cases. (Rec., p. 81.)

Thereafter each cause came on to be heard before the Supreme Court of the District, pursuant to the mandate of the Court of Appeals, and the defendants elected to stand upon the motion to dismiss and not to plead further. The Court, upon consideration of the bill of complaint and other pleadings, decreed that

the Act of Congress known as the District of Columbia Minimum Wage Law was invalid because in conflict with the Constitution of the United States and the amendments thereto, and enjoined the Board from enforcing or attempting to enforce the order of March 26, 1920. (Rec., pp. 15, 28.)

Thereafter at the January Term, 1923, the defendants, constituting the Minimum Wage Board, appealed from these decrees to the Court of Appeals of the District of Columbia, and filed motions to affirm or reverse. By order entered January 11, 1923, the Court of Appeals affirmed the decrees of the Supreme Court. (Rec., p. 83.)

On these appeals to this Court the question on the merits presented for decision is the constitutional validity of the Act of Congress authorizing and directing a board to fix wages for women in various employments in the District of Columbia and to punish by fine and imprisonment the paying of less wages than those fixed.

ARGUMENT.

I.

The Nature and Scope of the Law.

Before discussing the question of the consistency of the legislation in question with the Constitution of the

United States, it is desirable to advert to certain features of the law which will help to make clear its full purport and its scope and effect.

First: The law is a "price-fixing" law, pure and simple. It does not regulate businesses or working conditions, and by such means indirectly affect the cost of labor. It is not concerned with dangerous or unwholesome businesses, places of work, or machinery or appliances, nor is it concerned with fraudulent practices or the overworking of human beings. It is concerned solely with the amount of money involved in contracts of personal employment by which labor is exchanged for money or other forms of property. It requires the Board to fix the price of labor in certain employments in the District of Columbia. This fixing of price is its aim and object. Regardless of the wishes of the parties to the contract of employment, though they be of full age and able to contract, regardless of the skill of the employee or the need of the employer, regardless of the wealth or income of either party, this law requires a fixed minimum, set by a board, to be paid in the exchange of labor for money, and enforces such payment under penalty of fine or imprisonment, or both, imposed upon the employer who disobeys.

Second: The law is not a temporary measure to tide over an emergency. It is not designed to prevent

the stoppage or interruption of public business by requiring the maintenance of wages already agreed upon until the parties can agree, reasonably and in order, upon a new standard. It is a permanent policy of wage fixing in the common occupations of the community, applying to private employment and to private business.

Third: From the standpoint of the woman who desires employment, the law, by the provisions affecting her employer, may forbid her to work in the common occupations of the community in admittedly healthy and moral surroundings, although she is of full age, is able and willing and desires to work, is amply supplied with the necessaries or luxuries of life, and is offered employment suitable to her and at wages satisfactory to her. The law does not say that persons or corporations engaged in particular businesses must pay certain wages as a condition for continuing in that business—it does something more and different—it says that, as to all occupations where the Board sees fit to act, women shall not work in the District of Columbia except for prices fixed by law, while men may work for any prices they see fit. So the woman, willing and able to work in safe, moral and healthful surroundings and under safe, moral and healthful conditions, can not make a bargain with her employer that she may wish to make and he may be willing to make, but this

bargain must be made by the Minimum Wage Board or not at all.

Fourth: The law affects employers who are women as well as employers who are men. The order of the Minimum Wage Board in question in this case applies to every person who employs any woman in any lodging house, restaurant or cafeteria. This, of course, includes women who own or operate such restaurants, lodging houses and cafeterias, and forbids them to agree with their waitresses or female servants as to the daily, weekly or monthly wage that shall be paid for services. The law is thus not limited to the bargain between the male employer and the female employee, but applies to the bargain where both parties to it are women.

Fifth: The law requires the fixing of a vague and uncertain standard as a condition of the orders, which have the force and effect of law, and the violation of which constitutes a criminal offense. The standard is more vague and uncertain than anything probably in any law heretofore enacted, that is, a price for service that shall be "adequate" to supply the cost of living and to preserve health and to protect morals. What will supply the cost of living and protect health and morals can obviously be merely a matter of opinion. Manifestly, opinions on this subject will differ as between a colored girl working in the Con-

gress Hall Hotel and a member of a board who may have an income of many thousands of dollars a year. The Board is required, in fact, to do a vain and meaningless thing, for it can not establish a wage which will "protect health and morals" and afford a "living". It can merely give the average of three opinions against possibly thousands of differing opinions.

An interesting light is thrown on this aspect of the law when it appears that the same woman employed to clean dishes in a restaurant, finding that $16.50 per week is by law the least with which to supply the cost of living and protect her health and morals, discovers without leaving the house where she lives, without eating other or different meals or buying any different kinds of clothes, that from $9.00 to $15.00 a week only is necessary to supply the cost of living and protect her health and morals when she decides to leave the hotel and take up work in a laundry, for the Minimum Wage Board by its orders, which have the force and effect of law, provides a minimum wage of $16.50 per week for hotel workers and a minimum wage of $9.00 to $15.00 a week for laundry workers.

To summarize, the point emphasized in this analysis of the law, is that this legislation has as its direct object solely the fixing of the price in contracts for services by women in purely private employments, without regard to the safety or the health or moral

surroundings of the business or occupation or the time of beginning or leaving work or whether the hours are long or short, and without regard to the resources or income of the employees.

This legislation is aimed directly and solely at the price to be paid in the bargain between employer and employee, and the thing condemned as unhealthy, unsafe or immoral as a justification for legislative interference, is merely the price itself, and not the condition or surroundings where the employment is carried on.

II.

Outline of the Argument.

We come then to discuss the power of Congress to enact this legislation. Our contention is, to put it in brief form, that this wage law is unconstitutional because it is a price fixing law, directly interfering with freedom of contract, which is a part of the liberty of the citizen guaranteed in the Fifth Amendment, and our position is that no exercise of the police power justifies the fixing of prices either of property or of services—that *the amount of the charge* received or paid in the exchange of money for property or labor in private business can not *itself* be called a matter affecting the public health, morals or safety, and thus brought within the scope of the police power. If a

wage fixing law is constitutional, then it must necessarily be because the liberty and property clauses of the Constitution do not inhibit the fixing of prices everywhere for all articles and services that are the subject of bargaining, for there is and can be no distinction in principle between the power to fix a charge for services and the power to fix the prices for houses, chattels or goods of any kind. We believe it is settled by the decisions of this Court, interpreting the Constitution, that the permanent fixing of prices in private business is not within the power of the legislative body. The reason for this, as we believe has also been settled, is that the Constitution itself has laid down certain fundamental principles of economics in establishing private ownership of property and individual liberty; that these fundamental principles can not *themselves* be declared to be inimical to the public health, safety, morals or welfare, and changed under the guise of an exercise of the "police power."

In taking up in detail the authorities on the question, there will be discussed in their order three points:

First: By a long line of decisions it is now settled that the protection of liberty and property guaranteed in the Fifth and Fourteenth Amendments includes freedom of contract.

Second: That a general wage law, permanent in operation, applying to all or to particular industries

not affected with a public interest, is uniformly assumed or conceded in the decisions of this Court to be inhibited by the fundamental guaranties of liberty and property established in the Fifth and Fourteenth Amendments.

Third: That the inhibition against wage laws is not removed by having such laws apply to women alone and excluding men.

III.

The protection of liberty and property guaranteed in the Fifth and Fourteenth Amendments includes freedom of contract, embracing contract for personal services.

In numerous cases decided by this Court it has been determined beyond question that the provisions of the Fifth Amendment and the similar provisions of the Fourteenth Amendment declaring that no person shall be deprived of life, liberty or property without due process of law, guarantee to individuals freedom of contract, subject only to the exercise of the inherent power to protect the public health, morals, safety or welfare. This is so firmly established that it is not necessary to review the authorities at length.

In *Allgeyer* v. *Louisiana* (165 U. S. 578, 590), this Court quoting an earlier decision said:

> "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the fourteenth amendment. The court assents to this general proposition as embodying a sound principle of constitutional law."

In *Coppage* v. *Kansas* (236 U. S. 1, 14), this Court said:

> "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property."

Of course, the right to make contracts necessarily includes the right to make agreements for personal services, and this Court has many times so stated. In the case of *Coppage* v. *Kansas, supra,* the Court said, following the quotation above given:

> "Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of

liberty in the long-established constitutional sense."

In *Truax* v. *Raich* (239 U. S. 33, 41), the Court said:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure."

In the recent case of *Prudential Insurance Company* v. *Cheek* (— U. S. —; decided June 5, 1922), it was stated that this Court has affirmed the principle in recent cases:

> "That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elementary part of the rights of personal liberty and private property * * *."

This much is settled beyond dispute. These fundamental principles with reference to laws abridging the right of contract are well recognized and are not now open to argument.

These principles apply to legislation by Congress for the District of Columbia.

In *Callan* v. *Wilson* (127 U. S. 540, 550), Mr. Justice Harlan speaking for the Court, said:

> "There is nothing in the history of the Constitution or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property."

In *Wight* v. *Davidson* (181 U. S. 371, 384), the Court speaking of an act regulating assessments on property in the District of Columbia, said:

> "No doubt, in the exercise of such legislative powers, Congress is subject to the provisions of the Fifth Amendment to the Constitution of the United States, which provide, among other things, that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

IV.

That a law fixing wages generally in private employment would be beyond legislative power is uniformly assumed or indicated in the decisions of this Court.

That a general wage law applying to private employment (and not to business of the state or business affected with a public interest) would be uncon-

stitutional as violative of the guaranties with reference to liberty and property, is generally recognized. Judge Cooley, in his Constitutional Limitations (seventh edition, p. 870), says:

> "In the early days of the Common Law it was sometimes thought necessary, in order to prevent extortion, to interfere, by royal proclamation or otherwise, and establish the charges that might be exacted for certain commodities or services. The price of wages was oftener regulated than that of anything else, the local magistrates being generally allowed to exercise authority over the subject. The practice was followed in this country, and prevailed to some extent up to the time of independence. Since then it has been commonly supposed that a general power in the state to regulate prices was inconsistent with constitutional liberty."

In Labatt, Master and Servant (2nd Ed., Sec. 846, p. 2285), it is said, referring to wage laws:

> "So far as regards work in which neither the state itself nor a political subdivision thereof is concerned, there can be no reasonable doubt that, even where the matter is not covered by any explicit provision in an organic law, a restrictive statute would, under the general principles of American constitutional jurisprudence, be treated by the courts as invalid, whatever might be the nature of the business affected."

Though the constitutionality of a wage law has not been directly passed upon by this Court, the question has been involved in many cases, and the Court has uniformly indicated that such laws would not be valid. In *Frisbie* v. *United States* (157 U. S. 160, 166), in an unanimous decision, the Court referring to the exercise of the police power and the undoubted right to forbid the sale of lottery tickets, to prevent all contracts by minors, to prevent contracts by common carriers releasing themselves from liability for negligence, said:

> "The possession of this power by Government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the *price* of his labor, services, or property." (Italics ours.)

In *Coppage* v. *Kansas* (236 U. S. 1), a case relating to laws prohibiting contracts by which an employee agreed not to become or remain a member of labor organizations, this Court discussed at length the very question here in issue, and pointed out the reasons why restrictions on contracts between employer and employee, which are intended directly to benefit one party to the contract at the expense of the other and only incidentally to effect some purpose under the police power, but do not have directly (but only indirectly)

any relation to public health, morals, safety or welfare, cannot be upheld consistently with the guaranties of the Fourteenth Amendment.

The analogy is clear between the restriction of the terms of a contract of employment as to membership in a labor union and restriction as to the amount of the pay, for each is a direct interference with the agreement of the parties for the benefit of one party and not directly related to the public health, safety, morals or welfare. Indeed, the language used by the Court in *Coppage* v. *Kansas* (236 U. S. 1, 17) applies with even greater force to the price-fixing term in a contract, for while the restriction considered in that decision might result in financial benefit to one party, the fixing of wages directly and plainly makes a distribution of money as between the employer and employee. The language on the subject of such laws is as follows:

> "As to the interest of the employed, it is said by the Kansas Supreme Court to be a matter of common knowledge that 'employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making contracts of purchase thereof.' No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally un-

hampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed, a little reflection will show that wherever the right of private property and the right of free contract coexist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a state shall not 'deprive any person of life, liberty or property without due process of law', gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as coexistent human rights, and debars the states from any unwarranted interference with either.

"And since a state may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power

> in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."

In *Bunting* v. *Oregon* (243 U. S. 426), this Court had under consideration the "hours of service law" of Oregon. It was contended by the plaintiff in error that because of certain provisions relating to overtime the law in effect required the fixing of wages; by the defendant in error it was contended that the law was an "hours law" and not a "wage law". The Court held the law constitutional, pointing out with emphasis that this conclusion rested upon a finding that the law was not to be considered a wage law.

In the latest decision directly on the point, *Wilson* v. *New* (243 U. S. 332, the Adamson Law case), this Court very carefully dealt with the question. In that case the Court had before it a statute fixing an eight-hour working day for railway employees engaged in the operation of trains upon interstate railways and temporarily requiring that the then existing wages should continue until the parties could agree. This law was subjected to the test of the constitutional provision. It is important to note how this Court met the suggestion that the law was invalid be-

cause it required the continuance of wages already agreed upon. First this Court pointed out in clear and unambiguous language and at a number of places in the opinion that the law constituted a regulation of *business affected with a public interest.* At page 353, the Court said:

> "*there is no question here of purely private right* since the law is concerned only with those who are engaged in a business charged with a public interest * * * and which we have seen comes under the control of the right to regulate." (Italics ours.)

To make the matter more emphatic, the Court pointed out that this conclusion was reached by (page 353)

> "conceding that from the point of view of the private right and private interest as contradistinguished from the public interest the power exists between the parties, the employers and employees, to agree as to a standard of wages *free from legislative interference.*" (Italics ours.)

And next the Court said that this right to interfere in any way with the wage agreements even in a business affected with a public interest, was limited to (page 353)

> "the law-making power to protect the public right and create a standard of wages resulting from

> a dispute as to wages and a failure therefore to establish by consent a standard."

and this only *temporarily*, as an emergency measure, to prevent an obstruction of public business. The law, as the Court emphasized (page 345), was

> "not permanent but temporary, leaving the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time."

This Court further pointed out and emphasized the distinction—"the very broad difference between the the two powers exerted"—between the permanent fixing of wages and the temporary continuance of wages already agreed upon until a dispute on public carriers could be settled; and finally to sum up and mark the limits of legislative power, the Court said (page 347):

> "It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard *is not subject to be controlled or prevented by public authority.*" (Italics ours.)

And this was emphasized in the later "Adamson Law" decision, *Ft. Smith and Western R. R. Co.* v.

Mills (253 U. S. 206, decided June 1, 1920), where arose the question of the right of the employer and employee to agree upon wages in the exceptional circumstances occurring in the absence of dispute temporarily stopping the business of the railroads of the country and not affecting other roads so as to interfere with their operation and where the parties were willing to agree. The Court held that it would not break up the bargain between the employer and employee, saying (page 208):

> "We can not suppose that it was meant to forbid work being done at a less price than the rates laid down, when both parties to the bargain wished to go on as before and when the circumstances of the road were so exceptional that the lower compensation accepted would not affect the market for labor upon other roads."

All the Justices concurred in that ruling.

Thus, in these later cases, are the limits clearly defined. The utmost to which the legislative power extends is to provide for the *temporary continuance of wages in a business affected with a public interest,* and to prevent the stoppage of the public business until the parties can agree. Beyond this, the freedom of the employer and employee to agree upon wages "is not subject to be controlled or prevented by public authority."

The principles laid down in *Wilson* v. *New, supra,* were later applied by this Court in the case of *Block* v. *Hirsh* (256 U. S. 135, decided April 18, 1921), to the constitutional test of a law continuing rents in the District of Columbia during an emergency created by the war. While that case dealt with a rent law, and not with a wage law, the opinion of this Court is directly in point on the questions presented in the case at bar, involving as it did an interpretation of the Fifth and Fourteenth Amendments with relation to the power to fix prices by legislative action. While this Court held the Ball Rent Act for the District of Columbia valid, the ground of the decision and the limitations pointed out are so significant on the question now before this Court as to have controlling weight in the argument here presented. In discussing that case it is not necessary to detail the provisions of the Ball Rent Act. The point desired to be emphasized is that the law was declared to affect certain kinds of property in the District and to continue the rents of such property notwithstanding the expiration of terms (subject to regulation by commission, etc.), and this continuance was made necessary by emergencies growing out of the war embarrassing the Federal Government in the prosecution of the public business.

The first question before the Court was whether the law could be considered as regulating a business affected with a public interest so as to come fairly within the reason of the decision in the Adamson Law Case. Whatever may have been the divergent views as to whether the renting of property could be considered a business affected with a public interest, the majority of this Court held that it could be and was, and based the first proposition of its decision on that ground. But even so, the fixing of prices, the Court held, would be within the power of Congress *only as a temporary emergency measure.* The language of the Court on this subject was emphatic. It was said (p. 157):

> "The regulation is put and justified *only* as a temporary measure." (Italics ours.)

It was sustained only as a temporary measure on authority of *Wilson* v. *New, supra,* the Adamson Law Case above referred to. But to put the matter beyond doubt and to leave no misunderstanding as to the furthest limit to which the decision went, this Court said:

> "A limit in time, to tide over a passing trouble, well may justify a law *that could not be upheld as a permanent change.*" (Italics ours.)

There was a difference of view as to whether the law could be upheld even as a temporary measure, but the inference is irresistible that all agreed that it could not be upheld as a permanent change.

The "temporary emergency" feature of the Rent Laws as ground of decision was again amphasized by this Court in the recent case of *Pennsylvania Coal Company* v. *Mahon* (No. 549, October Term, 1922, decided December 11, 1922), where the comment was made not only as to the Ball Rent Act case, but as to the Rent Law cases coming from New York, the Court adding, (after referring to the emergency nature of the laws as justifying the decisions), that "they went to the verge of the law."

There is in the case at bar, of course, no element of the exceptions referred to. The Minimum Wage Law is not a temporary emergency measure, but is a permanent change. It concerns the right to work in the common occupations of the community, and, of course, is not a regulation of public business or business affected with a public interest.

So far as the argument on authority is concerned, we are bound to conclude from decisions of this Court interpreting the Constitution, that a permanent wage law applying to private individuals in any employment would be unconstitutional as beyond the definite limits of legislative power as defined in the Fifth and Fourteenth Amendments.

V.

There is a clear distinction between "hours of service" and similar laws directly promoting health or safety or preventing fraud and only indirectly affecting the cost or remuneration of labor, on the one hand, and on the other hand "wage laws," directly fixing the price in the bargain between employer and employee, whatever may be the indirect or remote effect intended to be secured.

Laws regulating erection of dangerous or unsafe structures or limiting work in underground mines or restricting hours of labor, etc., are measures directly promoting health, securing safety or preventing fraud. They rest upon the inherent power of the state to secure the public welfare by protecting the public health, morals and safety. They may or may not affect indirectly contractual relations between individuals or cause loss to one or gain to another. If they do, that is a secondary result, which is not the "evil" aimed at. The unhealthy condition, the danger to safety, the probability of fraud, are the evils aimed at and directly dealt with. That such laws may indirectly or remotely affect the use of property by some individuals is beside the point. An individual's desire to use his own property according to his own whim cannot stand in the way of such protection of the state itself and

the body politic, for such laws are consistent with the private ownership of property as sanctioned in the Constitution. But to take the property of A and give it to B, C and D is fundamentally different, even though by enriching B, C and D, their health or morals might be promoted indirectly. Laws which would transfer the money of one individual to another or fix the amount of money to be given in exchange for property, cannot have any real or direct relation to health. The possession of ordinary property, much or little, cannot fairly be said to be inimical to health, or if it is, then the fundamental guaranties of individual rights secured in the Constitution, which sanction the private ownership of property, are themselves inimical to health; but, of course, this cannot be under our form of government. The mere restriction of liberty or property—the very thing inhibited by the Constitution—cannot itself be denominated "public welfare."

The distinction we have pointed out has been recognized by this Court in an elaborate opinion on this subject. In *Coppage* v. *Kansas*, 236 U. S. 1, after referring to the numerous and familiar cases in which the police power has been held properly exercised to protect the health, safety, morals, or welfare, such as limiting employment of workers in underground mines, as sustained in *Holden* v. *Hardy* (169 U. S. 366), and forbidding contracts limiting liability for in-

juries by railroads, as sustained in *Chicago, B. & Q. R. Co.* v. *McGuire* (219 U. S. 549), this Court said (page 18):

> "An evident and controlling distinction is this: that in those cases it has been held permissible for the states to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; while in that portion of the Kansas statute which is now under consideration—that is to say, aside from coercion, etc.—there is no object or purpose, expressed or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving one who has property of some part of what is characterized as his 'financial independence.' In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare. But, in our opinion, the Fourteenth Amendment debars the states from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. *The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare',*

> *and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.*" (Italics ours.)

The court added in that case that it was clear a statutory provision which was not a legitimate police regulation could not be made such by being placed in the same act with the police regulations and by being enacted under a title which declared a purpose which was a proper subject of the police power.

The same distinction was set forth in a single sentence by Mr. Justice Brewer speaking for the Court in *Frisbie* v. *United States*, 157 U. S. 160, 166. After reviewing the numerous instances in which the police power has been validly exercised—such as laws forbidding sale of lottery tickets, laws forbidding contracts by persons not *sui juris*, laws restricting common carriers from releasing themselves from liability for negligence and so forth, he tersely differentiated such exercise of power from "price fixing":

> "The possession of this power by Government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the *price* of his labor, services, or property." (Italics ours.)

The case we have just referred to was the unanimous decision of this Court and is one of the

leading cases on the question. The language quoted was a careful summary of the precise subject with which we are concerned, and was used in connection with a law fixing prices—the only kind of price fixing law in private employment as a permanent policy that has ever been sustained by this Court as within the power of Congress or the State legislatures. And that was a law limiting the price that should be charged for services in prosecuting a claim for pensions against the government itself, and this price fixing was sustained solely on the ground that a pension being a bounty granted by the Government, Congress, being at liberty to give or withhold pensions, had the undoubted power to prescribe the conditions under which claims should be prosecuted—not on the ground that this was for the public health, morals, safety or welfare, but because a gift by the Government was not restricted by constitutional guaranties of liberty and property, as clearly it would not be.

If, under our system of government, with its constitutional guaranties, the law-making body may, as to a purely private business, forbid employment at certain times in dangerous occupations, and may limit the hours of labor in underground mines, etc., or in any other employment where deemed necessary (regulations which admittedly may result in restricting to some extent the terms and conditions of contracts

of employment), why may not the law-making body also fix the *price* that shall be paid by the employer to the employee, which would also affect the terms and conditions of the contract of employment? *The answer is found in a consideration of the nature of the respective regulations.* Forbidding employment in dangerous businesses and regulating the hours of labor are valid exercises of the police power because the legislative body has determined that the business is unhealthy or the hours too long for health, and consequently such regulations have a direct relation to the public health or morals. But the holding of property (that is private ownership of property) and the sale of property or the price charged cannot themselves be said to be unhealthy or immoral. Laws fixing prices in the bargains between individuals are intended to change the rules for the distribution of wealth. They are attempts to correct the inequalities of fortune which follow inevitably from the very form of government which we have — a form which recognizes private ownership of property and personal liberty; they are attempts to alter the economic principles embodied in the Constitution itself, on the ground that the operation of those very principles is itself inimical to the public health, morals and safety. This cannot be done without an amendment of the Constitution.

While the right of private ownership of property is recognized in the Constitution itself, manifestly the law-making body cannot make all property common, on the ground that private ownership is dangerous to the public morals, health, safety or welfare, and that the making of all property common is but the exercise of the police power of the State. In our form of government, the State may, for example, forbid the erection of frame houses in thickly populated communities which may cause disastrous fires, or may require all buildings of a certain size to be equipped with fire escapes, but the State cannot determine for the individual owner what such buildings shall sell for, how much profit he must take, or how much loss he must suffer. The State may forbid the use of buildings for certain purposes which are deemed injurious to the public health, safety or morals; but if the private ownership of property is to be permitted, it cannot fix the price that shall be charged for the use, even though the price fixed by law would tend to prevent the use, and thus indirectly affect the public health, safety, or morals. A man must so use his own property as not to injure his neighbor's. But the price he sells it for does not "injure" his neighbor.

The reason why price-fixing and wage-fixing are not within the power of the law-making body is that they are efforts to alter economic laws which are recog-

nized as legitimate in the Constitution itself. Police power is broad, as has been many times said, but it must be exercised under the Constitution. It cannot be exercised to amend the Constitution or to change the form of government. (*Pennsylvania Coal Co.* v *Mahon,* No. 549, October Term, 1922, decided December 11, 1922; *Truax* v. *Corrigan,* 257 U. S. 312.)

VI.

If laws fixing prices or wages generally are inhibited by the constitutional guaranties because they are unwarranted interferences with freedom of contract the inhibitions are not removed by having such laws apply to women only and excluding men.

If a law fixing prices or wages is not a health law at all—because the mere freedom to determine the amount that shall be charged in the exchange of property or services for money cannot itself be dangerous to health, morals or safety—then manifestly it is not a health law for women any more than it would be for men. The distinction between those rights secured by fundamental law which are guaranteed to men and women alike, free in equal measure from any restriction and those whose exercise is subject to varying restrictions because of differences between the sexes is

not impossible to draw. Of course men and women hold their property subject to a proper exercise of the police power. And in the exercise of this power, there are necessarily differing conditions to be met requiring different treatment. One of these differences is that of sex. Requirements as to the equipment of factories, for example, might well be different where women are employed than they would be where men are employed. This is not because the legislative body is without *power* to regulate certain conditions of work (so as to promote the public health, safety or morals) as to men, but has the power as to women; for it has such power for the protection of men and for the protection of women. But it is obvious that cases arise where the need of the protection of the character provided differs because of differences in the sexes or may be needed for women to a greater degree than for men or may be more necessary for the one than for the other. But the fact that this difference exists in the kind, extent or character of the protection afforded by laws passed under the power to protect the health, morals or safety of both men and women does not mean that the constitutional guaranties are withdrawn from either men or women or extend to one and are withheld from the other because of differences between the sexes.

No better example can be given than in the case of "hours of service" laws. Because of her physical nature woman cannot stand the strain of long hours that the man can stand with due regard to health. So, as to work at night or in dangerous occupations there are differences in the need of protection to health, safety, or morals too obvious to need comment. But in such matters we are clearly within the domain of the police power. The differences are differences which the legislature in its discretion in exercising an admitted power may reasonably choose. Hours of service laws obviously constitute exertions of the police power. They have been sustained as to women, *Muller* v. *Oregon* (208 U. S. 412), but they have also been sustained when applying to men, *Bunting* v. *Oregon* (243 U. S. 426).

In determining the legislative discretion and finding whether there is an abuse of an admitted power, of course it is proper to consider the reasonableness of the law and in this connection the physical nature of those to whom the law applies is a factor in the discussion. The hours of service provided in a particular instance and under some circumstances might be reasonable—not an abuse of discretion—when applied to women workers while it might be unreasonable when applied to men. The difference between the sexes may well justify a different rule respecting hours of labor.

And it has been so held, *Muller* v. *Oregon*, 208 U. S. 412, 418. But the Court was careful to point out in this connection the following:

> "It thus appears, that putting to one side the elective franchise, in the matter of personal and contractual rights they (women) stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers."

In their rights to the operation of economic laws affecting the distribution of wealth as fixed by the Constitution itself, there are, of course, no differences between the privileges and immunities of men and those of women. Both are protected by the constitutional guaranties sanctioning the private ownership of property and the liberty of the individual, just as much so as men and women are equally protected by constitutional provisions forbidding conviction and punishment without trial. A law authorizing the seizure of property without just compensation would be obnoxious to the Federal Constitution, whether the owner of the property was a man or a woman. Such an act cannot escape condemnation because it affects only the property of women, even though the law making body might come to the conclusion that it was injurious to the health of the women in some communities to be

burdened with the responsibility of ownership of property. Freedom of contract is secured both to men and women. Both hold that freedom subject to those reasonable restraints which directly affect health, morals, safety or welfare, although indirectly affecting contractual rights. But each possesses contractual rights "free from legislative interference" which would directly strike down the right of contract and only remotely or indirectly secure thereby some purpose concerned with the public health, morals, welfare, safety, etc.

A law forbidding employers to fix as a term in the contract of employment, non-membership by the employee in labor organizations would be invalid as this Court has held; but manifestly it would be just as invalid if it applied to women, as well as to men—as doubtless the law in question did.

A law forbidding employers to contract for the employment of more than a certain percentage of aliens would be invalid as has been held; but it would be invalid applying to women as well as to men.

So a law fixing prices of property would be invalid; but the principles which make it invalid, make it invalid equally as to women and as to men.

So of laws fixing the price of services—wages.

A wage law is not a "health law" (in the sense in which those words are used when speaking of the

exercise of the police power) either for men or for women, because the mere naming of a price in any bargain cannot be said to affect directly the health, morals or safety. This is true of all price fixing laws, but it may be demonstrated in the case of this Minimum Wage Law as well as in that of any other similar restriction upon the right of contract.

It is said that it is necessary to the health and morals of women that they have enough to live on, and this is epitomized by saying that women are entitled to a "living wage". But this expression means and can only mean that women must have, for the protection of their health and morals, a "living income", that is, they must possess sufficient for their food, lodging, clothing, etc.; but this is true also of every human being. It is so obviously not confined to women but extends also to men that it is specious to suggest the contrary. But it does not follow from this, that those who have more than a living income can be compelled by law to hand over a part of that income directly to those who have less. This Government does not operate in that way. It may be conceded that it would be better for the world if there were no poor, and that it would be better for the poor if they were not poor. That does not mean, however, that their neighbors, their friends, their landlords, their employers, their employees, or their fellow servants,

can under our form of government, be compelled to contribute to their support. If they are in need of charity, the state, of course, has the power to help them and levy taxes upon all equally for this purpose, or individuals more fortunately situated may voluntarily, out of their abundance, give to them. But it is voluntary; it can not be made a criminal offense not to make the contribution.

The redistribution of wealth in this country so that all might receive the same or approximately the same income may seem desirable to some, but it requires no reasoning to show that it can not be done under the limitations of our written Constitution—certainly, not by directly requiring A to give a part of his property to B. It can not be done by calling the law which would accomplish it a "health law," a "moral law," a "safety law," or a "welfare law". There is no such magic in the "police power."

And if inequalities of fortune, resulting from the sanction of private property and liberty in the very terms of our Constitution, can not be leveled by distributing the wealth of the country to all in equal proportions, it can not be done partially or indirectly by requiring each to give to another at least the amount that some authority selected for the purpose might opine is "adequate", "sufficient" or "desirable".

The state is not without authority to deal with the

situation of the poor and needy. The ways are well known and are in operation in every community in the country and by the National Government and every State and every subdivision of a State. *But individuals can not have some particular income, enforced by law, from other individuals.* This is because there are individual rights with which such enforcement would conflict. These rights are higher, more important, more fundamental; they are essential to our form of government as distinguished from that form of government in which the right of private ownership of property is abolished. They are rights graven in our bill of rights—the rights of life, liberty and property, which stand at the base of our governmental structure.

But this Minimum Wage Law, as any other wage law of its kind, whether for men or for women, does not assure to anybody a living income. It does not even deal with the minimum amount of money that a woman is to have for her support. It deals solely and only with the *amount which one individual must transfer to another individual,* regardless of the latter's riches or poverty or means of support or lack of them.

That the wage law merely secures the fixing of prices, regardless of the amount of the individual's necessities, is shown by the operation of the law. The Minimum Wage Board, after an investigation, fixes

the wages of hotel, boarding house and hospital employes at $16.50 per week. This is said to be due to the fact, (and this is the only excuse given for the particular amount) that $16.50 a week is the *minimum amount* which will protect the employes' health and morals; and it fixes this amount for hotel workers; and then the same Board decides that from $9.00 to $15.00 a week is the *minimum amount* that a woman can live on with due regard to her health and safety, and fixes these amounts for the *laundry workers.* Any given employee may well be employed in either position. The same woman having the same needs, living in the same house and eating the same food, manifestly can not have a *minimum* need of $16.50 a week and at the same time a *minimum* need of $9.00 to $15.00 a week. There is nothing inherent in the laundry business by which its workers automatically receive outside help in an amount making up the difference between $9.00 a week and $16.50 a week.

The only conclusion to be drawn from the fixing of different wages for women workers is that the Board simply decides how much the hotel or the laundry or the boarding house ought to pay and must pay, whatever the condition of their women workers. The Board, to the extent to which it acts, *simply distributes wealth as between the employer and employee.*

Again, if a woman worker having in mind her own

health, safety, morals or welfare, desires to take less wages and better food and lodging than she could otherwise secure, this law forbids her to do it. If she wishes to secure—as she might if she works in a boarding house—all the comforts necessary to a decent living, her room, her board and her clothing, and in consideration of these, less wages, the orders of the Minimum Wage Board make the bargain a crime. For the Board has anticipated such a possibility and *fixed the price of meals* at thirty cents per meal and fixed *the price of lodging* at $2.00 per week, if these are furnished to an employee and requires that the wages of $16.50 per week less these deductions only, must be paid when meals and lodging are furnished. Such a bargain between a woman and her employer would be but the exercise of the privilege which belongs to the liberty of the individual. There is no general good under our law to be secured by taking away from men or from women the mere *right to bargain*.

Again, if a woman having an income "adequate" to protect her health, or morals, desires to add to that income by engaging as a nurse at the Children's Hospital for what the institution is willing to pay, this law forbids it—makes it a criminal offense punishable by fine or imprisonment or both, for any director of the Children's Hospital to agree to such an arrangement. Is there such a difference between men and women as

that it can be said in one breath that the enjoyment of such a privilege as that, if claimed by a man, would not in any way directly affect his health or morals and in the next breath that, if claimed by a woman, it would be dangerous to her health and morals?

The right to work for a living in the common occupations of the community is the right of all citizens under our government. As stated by this Court "it is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure", (239 U. S. 41.)

It is a right given both to men and to women. It cannot be true that the moment the woman leaves the home to engage in trade or work and exercises such right, she thereby loses the protection of fundamental guaranties in the Constitution.

> "The right of a person to sell his labor upon such terms as he deems proper,"

says Mr. Justice Harlan in *Adair* v. *United States*, 208 U. S. 161, 174,

> "is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employe to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services

> of such employe. * * * In all such particulars the employer and the employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract *which no government can legally justify in a free land.*" (Italics ours.)

This emphatic statement of the fundamental rights secured by the Constitution was surely not intended to be limited to men and to exclude women.

VII.

Answer to the contentions of appellants.

(1) As to the contention that this Court must consider only the reasonableness of the law so as to determine whether it is arbitrary, wanton or spoliative, and cannot consider the power of Congress to deal at all with the subject.

The first contention of counsel for appellants is that the Court in passing upon the constitutionality of a law, purporting to be the exercise of the "Police Power," must necessarily examine into the question of the reasonableness, desirability, and popular opinion of the law, and if it finds that reasonable men could have come to the conclusion that the law was needed or desirable, the law at once becomes a proper exercise of the "Police Power," and valid, because,

as counsel contends, the determination as to whether a law is desirable or necessary rests exclusively with the law-making body in the absence of such arbitrary action as could not have been taken by reasonable men.

This argument has no application to a case of the kind here before the Court.

Where the Court is dealing with a law clearly *within* the domain of the "Police Power" (such as a law regulating the erection of dangerous or unsafe structures or a law limiting work in underground mines or restricting hours of labor, etc.), the legislative determination of the necessity for such a law and the measures to be adopted and the extent to which the remedy shall go, is final and conclusive, if the law could in any way be considered a reasonable exercise of the admitted power. In such a case, it is necessary to consider the evidence showing the extent of the evil and other information presented to the legislative body so as to see that the legislative determination was reasonable. This is because even the "Police Power" cannot be exercised by legislation that is spoliative and oppressive. In such a case, the question before the Court is whether the law, though within the domain of the "Police Power" is so oppressive and unwarranted as to be an unreasonable exercise of that power and an abuse of it. And in such a case, manifestly it is the

duty of the Court to give every presumption to the legislative determination.*

But where, as here, the question is not whether the legislative body, acting clearly within the domain of the "Police Power," has exceeded its discretion, but *whether the law is within the domain of the "Police Power" at all*, a very different rule as to the function of the Court prevails. In such a case the Court must determine for itself whether the law really constitutes an exertion of the "Police Power." On this question the evidence as to the desirability or expediency of such a law cannot control the decision. Even the legislative declaration that the law *is* an exercise of the "Police Power" does not make it so nor conclude the Court. To take an extreme case, suppose Congress (as it did) provided by law for an income tax upon all individual incomes, before the Sixteenth

*An example of such a case is *Holden* v. *Hardy*, 169 U. S. 366. In that case the Court had before it an act regulating hours of employment in underground mines. That law was clearly an exercise of the "Police Power." The question was, however, whether the legislation was so oppressive and unjust as to be invalid *as an exercise of the power*. The Court, after stating that there were limitations upon the exercise of the power of the Legislature to preserve the public health, safety, morals, or welfare, added that

> "a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

And so the Court reviewed the desirability and necessity for such legislation, giving every presumption to the legislative determination, and found that it could not be considered an unreasonable exercise of the admitted power.

Amendment. Doubtless voluminous statistics were examined by Congress in considering such a law, and doubtless the law was considered by Congress to be for the public good, but the Court was not precluded from examining into the question as to whether such a law was valid because the law-making body had previously determined that it was reasonable. Clearly, also, such a law would not have been made valid and constitutional had Congress declared in express terms that it was enacted in the interest of the public health, morals, safety or welfare. Such a law was invalid because it transcended the power of Congress, being a direct tax not apportioned. It was invalid regardless of the statistics which justified it or the popular opinion which upheld it. Such opinion could be carried into effect only by an amendment to the Constitution. (*Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429; *Bailey* v. *Drexel Furniture Co.*, No. 657, October Term, 1921.)

A statute, taking the property of A and giving it to B—which would everywhere be admitted to be beyond the legislative power—would not be aided by a showing that the law-making body had examined a mass of evidence before passing such a law, and that statistics had convinced it that such a law was desirable. Such an enactment is contrary to the fundamental principles

in the Constitution, and could not be valid under our form of Government.

An example of a law thus beyond legislative power, is found in the statute of Kansas passed upon by this Court in *Coppage* v. *Kansas*, 236 U. S. 1, which made is a criminal offense for any employer to put in the term of the contract of employment a clause providing that the employee should not join or remain a member of a labor organization. That law had for its direct and primary object the striking down of the freedom of contract, on the ground that such freedom of contract in that instance was itself inimical to the public health, morals, safety or welfare. It did not regulate conditions of work or limit work in unhealthy conditions. It attacked the contract between employer and employee, so as to give some advantage to one side. It did so on the theory that the public welfare was in danger by permitting freedom of contract between employer and employee. The question before the Court was whether such law was within the domain of the "Police Power," and the Court had the duty of determining that question independently of the desirability and popular opinion of such law, and the Court held the law was not within the domain of the "Police Power."

As to the effect of the declaration of the Legislature itself that the Act was an exercise of the "Police Power," the Court said (p. 15):

> "It seems to us clear that a statutory provision *which is not a legitimate police regulation* cannot be made such by being placed in the same act with a police regulation or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power." (Italics ours.)

In that case there was doubtless shown that the Legislature of Kansas had before it a mass of statistics as to the advantage to health, morals, and public welfare, of the building up of organizations of working men. Doubtless there was urged also the general approval of such interference by the State with the relations between employer and employee. It appeared also that statutes like the one before the Court had been passed in California, Colorado, Connecticut, Indiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Porto Rico, and Wisconsin. But this Court answered, in effect, that it was not called upon to approve or question the right of individuals to join labor unions nor the legitimacy or advantages of such organizations; in other words, that the argument was beside the question.

It was urged that the emloyees as a class were at a disadvantage in making contracts because they were not financially able to be as independent as their em-

ployers, and that it was necessary for the State to step in and aid one party to the contract. To this the Court answered that the contention merely meant that the State should step in to level inequalities of fortune where deemed desirable, but under our Constitution the State could not do this, because inequalities of fortune were recognized as legitimate in the very provision of the Constitution that guaranteed the right of private ownership of property. Said the Court (p. 17):

> "It is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights."

To the argument that it was necessary in order to build up and strengthen organizations of employees for the State to throw its weight in the balance between employers and employees (an argument strikingly similar to that made in the case at bar), the Court, in effect, answered that this the State had no power to do under our Constitution, however desirable such help might be independently of the Constitution; and finally the Court, answering the question before it, as to whether or not the Act constituted an exercise

of the "Police Power," in holding that it did not, said (p. 19):

> "The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare' and treated as a legitimate object of the Police Power; for such restriction is the very thing that is inhibited by the amendment."

So, in *Truax* v. *Raich* (239 U. S. 33), this Court having before it the question of the validity of a law of the State of Arizona, forbidding any employer having more than five workers to employ less than eighty per cent, native born citizens, held such act to be invalid, regardless of the desirability of such a law under the conditions existing at the time in Arizona, regardless of the statistics which were deemed to justify it in the minds of the Legislature, and regardless of the argument that the measures adopted were appropriate to meet the conditions (inasmuch as all employers were allowed to employ as much as 20% of aliens). As is clearly apparent from the opinion, the question was not as to the desirability of such a law or whether it was an abuse of an admitted power, but whether there was authority under the Constitution thus to strike down the freedom of contract of employment. "We have frequently said," answered the Court (p. 43), "that the Legislature may recognize degrees of evil

and adapt its legislation accordingly, but underlying the classification is *the authority to deal with that at which the legislation is aimed.*"

So the contention made in this case by counsel for appellants, that the Court, in determining whether the act in question was an exercise of the "Police Power," must necessarily sustain the act if statistics before Congress were such as to show that reasonable men could believe such a law to be necessary or desirable for the public welfare, completely ignores the well considered decisions of this Court on this subject. It is unsound in a case of this character. It is simply another way of saying, what doubtless is the logical result of the views set forth, that the Courts have no right to set aside an act of the law-making body in any case. For if, as is contended, the Constitution is so elastic as that every law is within the discretion of Congress and that the Courts cannot find that this discretion has been abused, unless reasonable men could not come to the conclusion that the law was necessary or desirable, then there would be an end to the supremacy of the Constitution over the laws, and the duty of the Court to enforce the mandate of the supreme law. But such is not the character of our Constitution. "To what purpose", says Chief Justice Marshall, in *Marbury* v. *Madison* (5 U. S. 137), "are powers limited, and to what purpose is that limitation

committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed."

The views of this Court on this subject are exactly contrary to those set forth so insistently by counsel for appellants. When the question is, whether the legislative body has exceeded its authority (not whether it has abused its discretion), the courts are at liberty, and "indeed, are under a solemn duty" to determine independently whether the authority has been transcended. "If, therefore", said Mr. Justice Harlan, in *Mugler* v. *Kansas* (123 U. S. 623), "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, *or is a palpable invasion of rights secured by the fundamental law*, it is the duty of the courts to so adjudge, and *thereby give effect to the Constitution.*"

The suggestion in general terms that the Constitution is flexible is unsound. Conditions which the principles in the Constitution govern may change, and the Constitution is broad enough to meet the new conditions without altering the fundamental principles. But the principles themselves are immutable—they do not stretch or change; they are not elastic.

As said by this Court in *Truax* v. *Corrigan* (No. 13, October Term, 1921), quoting Mr. Justice Brewer in *Muller* v. *Oregon* (208 U. S. 412):

> "It is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action and thus gives a permanence and stability to popular government which otherwise would be lacking."

More fallacious still is the suggestion that the "Police Power" is flexible *in the sense that any legislative action desired may be included within it.*

Laws of the kind here under consideration bring us to the parting of the ways. If every law which expediency may suggest is to be called a "health law" or a "public morality law," or a "public welfare law," and thus becomes an exercise of the "Police Power," the constitutional limitations break down, and no action of the legislative body is in any way restricted by the positive guaranties in the fundamental law. This is not our form of government. To hold that it is, is to take the path that leads to the absolute supremacy of the temporary legislative body as against the fixed principles written into the Constitution as the very foundation of our government. The other path is the path that leads to an adherence to the fundamental principles, on the theory that their mainten-

ance is more important than the ease of remedy for a temporary undesirable condition.

The answers to the argument of counsel for appellants are sanctioned by the decisions of this Court in leading cases. Mr. Justice Holmes, in delivering the opinion of this Court, in *Pennsylvania Coal Company* v. *Mahon* (No. 549, October Term, 1922, decided December 11, 1922), referring to the protection of private property in the Fifth Amendment, said:

> "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. *But that cannot be accomplished in this way under the Constitution of the United States.*" (Italics ours.)

And again:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

In that case the Court held unconstitutional a statute of Pennsylvania forbidding the mining of anthracite coal in such a way as to cause the subsidence of any structure used as a human habitation—a statute which

would destroy previously existing rights of property and contract.

In the recent case of *Bailey* v. *Drexel Furniture Co.* (No. 657, Oct. Term, 1921), the Chief Justice, delivering the opinion of the Court on the question of the constitutional validity of the Child Labor Tax Law, said:

> "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards."

In *Truax* v. *Corrigan, supra,* this Court, speaking of a law of Arizona limiting injunctions in labor disputes between employers and employees, said:

> "Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world, and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual."

It may seem desirable on some occasions to interfere with the bargains of individuals in private business, in order to give one party or the other some advantage that he would not otherwise possess. But the maintenance of the principle of liberty and freedom of contract is more important, and therefore more desirable. It might be thought by some to be better to leave the will of the legislative body unrestrained by fixed principles of government, but it was thought best by the framers of the Constitution that this should be a "government of laws and not of men."

(2) As to the contention that the consequences of sustaining the power to enact such a law cannot be considered.

The next proposition of counsel for appellants is that the Court, in passing upon the constitutionality of the Minimum Wage Law, cannot consider the consequences of adopting the rule or principle of law which would sustain this legislation. Stated in another way, the proposition is, that the Court must not lay down any rule or principle at all, and must not apply any rule or principle, and must not contemplate the effect of its decision as a precedent in interpreting rights under the Constitution.

This theory (if we correctly interpret it) is wholly at variance with the decisions of this Court in cases involving the constitutional validity of laws of Congress or the States.

For example, in *Adair* v. *United States* (208 U. S. 161), this Court had before it the question of the constitutionality of an Act making it a criminal offense for any employer on railroads to require of employees as a condition of employment that the employee should agree not to become or remain a member of labor organizations. That law was claimed to be invalid as a deprivation of "liberty and property" guaranteed by the Fifth Amendment. It was urged to the Court, as showing the far-reaching effect of the principle necessary to sustain such a law, that if Congress had the power under the guise of a regulation of commerce to forbid railroad employers to make as a condition of employment non-membership in a labor union, then by the same reasoning Congress would have the power to require that railroads should employ *only* members of labor unions or only non-union men — which would clearly be inconsistent with the Constitution. That argument this Court *fully considered in passing upon the law,* and at page 179 the Court said:

> "If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business only members of labor organizations, or only those who are not members of such organizations—a power which could not be recognized

as existing under the Constitution of the United States."

Again, in *Truax* v. *Raich* (239 U. S. 33), where the Court had under consideration the law of Arizona, previously referred to, restricting the employment of aliens, it was urged to the Court that the provisions of the particular act under consideration allowed the employment of aliens in all employments where there were only five workers or less, and employment of aliens to the extent of twenty per cent of the total in all employments where there were more than five workers, and, therefore, under the conditions existing in the State this did not seriously interfere with employment at all. To this argument Mr. Justice Hughes answered (p 42):

> "It is insisted that the act should be supported because it is not 'a total deprivation of the right of the alien to labor'; that is, the restriction is limited to those businesses in which more than five workers are employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of twenty per cent of his employes. But the fallacy of this argument at once appears. If the State is at liberty to treat the employment of aliens as in itself a peril requiring restraint regardless of kind or class of

work, it cannot be denied that the authority exists to make its measures to that end effective. Otis *v.* Parker, 187 U. S. 606; Silz *v.* Hesterberg, 211 U. S. 31; Purity Co. *v.* Lynch, 226 U. S. 192. If the restriction to twenty per cent now imposed is maintainable the State undoubtedly has the power if it sees fit to make the percentage less. We have nothing before us to justify the limitation to twenty per cent save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only ten per cent of the employees to be aliens or even a less percentage, or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five."

* * * * *

"The restriction now sought to be sustained is such as to suggest no limit to the State's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded."

In *Bailey* v. *Drexel Furniture Co.* (No. 657, Oct. Term, 1921), this Court, speaking of the consequences of sustaining the Child Labor Tax Law, said:

"Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction

of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

It is also said by counsel for appellants that while this Court may not consider the consequences of laying down a principle which would sustain this law, it must consider the consequences of denying the validity of the law. It is said that laws of a similar nature have been passed in a number of States and that a decision adverse to the law now before the Court would annul such state laws and prevent carrying out the experiment in government sought to be made. As counsel for appellants has insisted in another connection, the laws referred to are not before this Court. But the fact that several state legislatures, whether a large number or small number, have attempted wage fixing, does not control the decision of the question now presented. That question is one of *power*, not of desirability or popular interest. That was made clear in *Coppage* v. *Kansas*, *supra*, where a similar question of power was presented and where it appeared that

statutes like the one before the Court had been enacted in some fourteen states.

As to the approval of such legislation by some State courts, which counsel for appellants so much relies upon, it must be remembered that all of the State cases which may be fairly cited rest upon the one decision from Oregon which came to this Court on error to the Supreme Court of Oregon. The weight of the Oregon decision as an authority on the interpretation of the Constitution of the United States must be tested by the fact that when that case came to this Court, the Court was equally divided on the question and no opinion was delivered.

As this Court has many times said, a decision by a divided court is no authority for the determination of other cases in this or any other court.* So far as

*Extracts from Decision in *Hertz vs. Woodman*, (218 U. S., 205, 211, 213):

"It is also urged that the Circuit Court of Appeals for the Seventh Circuit is precluded from requesting the instruction of this court, because it had in two cases theretofore decided the very question now certified. *United States v. Marion Trust Co.*, 143 Fed., 301; *United States v. Stephenson*, not yet reported. In both cases the decision was adverse to the contention of the United States. The first was affirmed by this court without opinion, by an evenly divided court, 203 U. S., 594, and, in the second, an application by the United States for a writ of *certiorari* was denied, 212 U. S., 572.

* * * * * *

"All of these cases were affirmances by an equally divided court of the judgments of the court below. * * *

* * * * * *

"In such circumstances the court below was not only free to regard the question as one open for determniation, but one which might well be

the Oregon law is concerned, it may be said with just as much reason that it was condemned as inconsistent with the Constitution of the United States as that it was sustained as a valid exercise of power.

Of the state cases cited by counsel for appellants, leaving out the decision in Massachusetts where the law is not compulsory and the case is not in point because it rests upon an entirely different ground and leaving out the decision in Texas where the validity of the law was not involved and where minimum wage laws have been repealed and proposed new ones vetoed as unconstitutional, there remain those from Washington, Arkansas and Minnesota—practically all resting upon the Oregon case.

In the case from Washington the statute of that State was upheld practically without comment on the authority of the Oregon case.

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certified to this court, that the question of law which has never been authoritively decided by this court might be so determined by an instruction as to how it should decide the matter when thus presented for reconsideration.

* * * * * *

"Under the precedents of this court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting *prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts.* The affirmance by a divided court in the second case shows this, for if it was not so, the second equal division could not have happened, for the case would have been controlled by the first equal division."

In the Arkansas case, *State* v. *Crowe,* 130 Ark. 272, the Court was divided. The majority opinion was based on the Oregon case. Chief Justice McCullough dissented in a vigorous opinion and the Justice writing the concurring opinion voted for sustaining the law solely because he felt bound by the course of proceedings in the Oregon case, but gave it as his opinion that "the statute clearly invades the Constitution of the United States and of our own state."

This leaves the decision of the Minnesota court as the only one where the question was independently reasoned, although in that case as well, the Oregon decision was relied on.

Since that decision this Court has passed upon the validity of a number of legislative enactments where the question was really one of power (as in the case at bar) and where the contention was pressed upon the Court that popular opinion or even widespread belief in the desirability of the law should justify the action as within the Constitution. Several of these have been cited in this brief.

As said by the Court of Appeals (*Children's Hospital* v. *Adkins,* 50 Washington Law Reporter, 721, Appendix B of this brief):

> "Legislation tending to fix the prices at which private property shall be sold, whether it be a commodity or labor, places a limitation upon the

distribution of wealth and is aimed at the correction of the inequalities of fortune which are inevitable under our form of government, due to personal liberty and the private ownership of property. These principles are embodied in the Constitution itself, and to interfere with their freedom of operation is to deprive the citizen of his constitutional rights. In other words, regardless of public sentiment or popular demand, such a radical change, if deemed necessary, should not be accomplished by legislative enactment or judicial interpretation, but by way of amendment in the orderly way provided."

"Any intimation that the Constitution is flexible, even in response to the police power, is unsound. Powers expressly delegated by the Constitution—such, for example, as the regulation of interstate commerce—may be extended to meet changing conditions, providing it can be accomplished without altering fundamental principles; but the principles are immutable, not elastic or subject to change. That a state may not impair the obligations of a contract, or that no person can be deprived of his property without due process of law, are principles fundamental, and if the legislature, in response to public clamor for an experimental social reform, may break down these constitutional guaranties by calling an act a 'health law', or a 'public morality law', or a 'public welfare law', all guaranties of the Constitution, under the alleged exercise of the police power, may be changed, modified or totally eliminated."

(3) As to the contention that plaintiffs below were not deprived of property rights because "special licenses" for defectives might have been obtained.

It is contended by counsel for appellants that there is no deprivation of property by the Minimum Wage Law because the plaintiffs below might have applied for a license under the so-called "license clause" and obtained leave of the Board before making contracts. This proposition is insistently and repeatedly set forth and runs through the entire argument of counsel for appellants. So far as it has any bearing on the constitutional question, this contention may be easily and conclusively answered. Counsel for appellants deduces from the language of the Minimum Wage Law the theory that under that law in the District of Columbia, all that the parties to the contract need do if they desire freedom of contract as to price is to apply to the Wage Board for a license—and that this is not a heavy burden upon the parties. Having made this assumption, counsel carries it throughout the argument and makes it the basis of his contention that there is no deprivation of liberty or property or freedom of contract because all can be free by getting a license.

But the argument is entirely beside the point in the case now before the Court for the Minimum Wage Law contains no such provision. The language in the Act

and the only language which refers to "license" or which counsel for appellants could point to in referring to "license" or "leave of the Board" is found in a short provision designated Section 13 of the Act, reading as follows:

> Sec. 13. That for any occupation in which only a minimum time-rate wage has been established, the Board may issue to a woman whose earning capacity has been impaired by age or otherwise, a special license authorizing her employment at such wage less than such minimum time-rate wage as shall be fixed by the Board and stated in the license. (40 Stat. L. 963.)

But under this provision, as is perfectly clear from a study of it, neither the employer, the Children's Hospital, nor the employee, Willie Lyons, could apply for or receive a license and if either or both did, the Minimum Wage Board and not the parties would fix the price in the contract.

To explain this, First: The employer cannot obtain a license because the Act does not anywhere authorize it. The license issues only to an employee. The Board cannot issue a license to an employer because the law authorizes its issuance only to an employee. The employer, employing labor, must pay the wages fixed by the Board or be subject to fine or imprisonment. These are the alternatives—there is no third.

The employer has no right under this law to get any special wages fixed under any circumstances. The possibility of action by some other person is surely not a *right* which affects or lessens the deprivation of rights under the Constitution which the Act brings about. If it is a right or privilege of anybody it is given to the employee only, not to the employer.

Second: The employee, as such, is not given any right to secure a special license. It is only the defective who can secure any change in the wage. It is only the woman "whose earning capacity has been impaired" to whom a special license may be issued. She must *establish* not that she desires to work for less wages or that she is able to support herself without wages or with the wages desired, but that she is impaired as to earning capacity in some way—"by age or otherwise". Assuming that the employee who could thus show she was defective, could obtain the right to make her own contract, is there any the less deprivation of the rights of those employees who are not able and willing to proclaim and prove that they are defectives and impaired in their earning capacity?

Third: But even as to such defective who has applied to the Board there is still given no freedom of contract. The Board and not the employee fixes the wage even then. The law requires even after the

license is obtained, such "wage as shall be fixed by the Board and stated in the license".

The Children's Hospital could not have secured a license from the Minimum Wage Board because the law does not authorize it; Willie Lyons could not have secured a license from the Minimum Wage Board because her earning capacity was not impaired by age or otherwise, and if she could have obtained a license she still would have been subject to the price-fixing of the Board and not to the price-fixing by agreement with her employer. There is, therefore, in Section 13, no provision whatever which affects the argument on the invalidity of the statute.

Counsel for appellants also assumes in this part of the argument that it is a deprivation of property rights only which gives the plaintiffs below a cause of action. In this, also, counsel is in error. In a case of the character of that at bar, it is the right of freedom of contract which has been infringed and that is a right which, (as many times stated by this Court) is part of the "liberty" protected by the Fifth and Fourteenth Amendments, and it is the infringement of this "liberty" which gives the cause of action. *Truax* v. *Raich* (239 U. S. 33).

(4) As to the assignment of error in the action of the Court of Appeals of the District of Columbia in granting a rehearing on the first appeal from the Supreme Court of the District.

The cases before this Court are appeals from final orders of the Court of Appeals of the District of Columbia, affirming decrees of the Supreme Court of the District adverse to the appellants here. These final orders, which appellants here seek to have reversed, were orders made by the Court below upon appellants' appeal from the Supreme Court of the District and upon appellants' assignment of errors and motions to "affirm or reverse."

The orders were made by the Court in regular session, composed of the regular justices authorized by law to sit; there was no temporary vacancy and no occasion or right at that time to call in a substitute justice from the Supreme Court of the District.

On *prior* appeals from the Supreme Court of the District, which ended in orders, not final, but sending the causes back to the lower court for further proceedings, there *were* rehearings granted. It is the granting of these rehearings on the *first appeals,* that appellants now assign as error, in their proceedings in this Court, seeking solely to reverse the orders on the second appeals.

To state the contention in support of this assignment of error seems to answer it, without extended discussion. If there were error in granting or refusing reargument on the first appeals, it is not material in the present proceedings, for these are (as they must be) appeals from the final orders only, made on the second appeals to the Court of Appeals adverse to the present appellants, and in which there was no reargument or rehearing granted or refused nor any question of the constitution of the Court in the cases.

The cases were properly before the Court on the second appeals. The appellants themselves took them there and invoked the action of the Court (*Rooker* v. *Fidelity Trust Co.*, No. 285, Oct. Term, 1922, decided February 19, 1923). To apply the language of this Court: "Both decisions were in the same case, the first was interlocutory; the second was final. Concededly, the case was properly before the Court on the second appeal; the plaintiffs evidently thought so for they took it there."

But, in any event, it is elementary that the granting or refusing of a rehearing in an equity suit is not the subject of review. (*Steines* v. *Franklin County*, 14 Wall. 15; *Roemer* v. *Neumann*, 132 U. S. 103.) The motion or petition is addressed to the discretion of the Court, as shown by all the decisions in the Federal courts. (*Steines* v. *Franklin County, supra.*)

The inherent power of courts (having authority to make rules of procedure and amend them) to correct their own orders during the term is well recognized everywhere.

The contention that the order granting the rehearing on the first appeals was not made by the *Court*, but by an individual member thereof, is without basis in the record. The record shows the order was made by the Court, the Chief Justice dissenting. (On the other hand, the record does show that the first order, that made by letters from Mr. Chief Justice Smyth and Mr. Justice Stafford, who had been the temporary judge, was made without any action, concurrence or dissent of Mr. Justice Van Orsdel, a member of the Court. Nor was that order put on by two members of the Court acting in the absence of a third, for all were absent on vacations and subject to the same method of consultation.)

The argument of counsel for appellants as to the effect of the designation of a special justice to fill a temporary vacancy in the Court, has no support or basis in the law governing the Court of Appeals. That law (Sec. 225, District of Columbia Code) authorizes the members of the Court present, in case of the temporary illness of one or more of the justices, to "designate a justice or justices of the Supreme Court of the District of Columbia to temporarily fill the va-

cancy or vacancies so created", the justice so designated to sit "while such vacancy or vacancies shall exist." In the same section the Court is given authority to make rules and regulations for the transaction of its business.

The record leaves no doubt that Mr. Justice Robb had resumed his place in the Court before the petition for rehearing was filed and passed upon.

If there were some custom in the Court as to the length of time the temporary justice should sit, it cannot affect the question of power. But the practice varied, at the least, as shown by the record in *Hein* v. *Pungs*, 9 App. D. C. 492

As different deductions appear to be made from the facts, it seems desirable to recite briefly the pertinent proceedings in the cases (taking the proceedings in the Children's Hospital case as typical).

On May 19, 1920, bill for injunction was filed by the Children's Hospital. (Rec., p. 2.) On June 25, 1920, order was entered by the Supreme Court of the District denying the injunction and dismissing the bill. (Rec., p. 13.)

From that order appeal was prosecuted to the Court of Appeals, and in the January Term, 1921, was argued by counsel (Rec., p. 31), and the opinion was handed down during the Term (June 6, 1921) by Chief Justice Smyth and concurred in by Wendell P. Stafford, Jus-

tice of the Supreme Court of the District, sitting in the place of Mr. Justice Robb. (Rec., pp. 31, 41.)

Thereafter, on June 14, 1921, and within fifteen days (exclusive of Sundays and holidays) from the decision of the Court, the Children's Hospital filed a petition for rehearing. (Rec., p. 49.) This was within the time required by the rules, which also provide that no mandate shall issue within said time unless upon special order of the Court for cause shown.

That petition recited an important decision of this Court in the Ball Rent case, rendered since the argument and submission of the cause in the Court of Appeals, and asked that a reargument be had and that the mandate be stayed until a rehearing could be had and decision rendered. (Rec., pp. 44-48.)

It sufficiently appears that the petition for rehearing was filed after the judges had separated for their vacations, for the record shows that the copies were mailed by the clerk to the several justices, including Mr. Justice Robb (Rec., p. 49), who had previously resumed his place on the bench.

On June 22, 1921 (still within the fifteen days, exclusive of Sundays and holidays, in which a petition for rehearing might have been filed), the clerk entered on the record an order denying the petition for rehearing. That order was made upon letters to the clerk from Mr. Chief Justice Smyth and Mr. Justice

Stafford (Rec., p. 50). It sufficiently appears that no action of any kind was taken by Mr. Justice Van Orsdel, who had sat in the case, and it also sufficiently appears that the Justices were absent on vacation at the time.

Thereafter, on July 13, 1921, still within the same term, the Court entered the following order:

> "On consideration of the appellant's motion for a rehearing in the above entitled cause, it is by the Court this day ordered that said motion be, and the same is hereby granted, and that this cause be and the same is hereby restored to the calendar for rehearing in due course. Mr. Chief Justice Smyth dissenting." (Rec., p. 52.)

Thereafter, on September 26, 1921, a motion was made in the Children's Hospital case by the appellee to set aside the order granting the motion for rehearing, and on October 6, 1921, a similar motion was filed in the Lyons case, which motions were denied October 7, 1921, Mr. Chief Justice Smyth dissenting. (R., pp. 53, 54, 55.)

On October 10, 1921, counsel for the Minimum Wage Board appeared for the reargument, and on motion leave was granted to counsel for the Board to file additional briefs (Rec., p. 55), and the argument was made by counsel for both sides.

Thereafter, opinion was handed down by Mr. Justice Van Orsdel, concurred in by Mr. Justice Robb, Mr. Chief Justice Smyth filing a dissenting opinion. (Rec., p. 56.)

And on November 6, 1922, the Court, the Chief Justice dissenting, entered an order reversing the decree of the Supreme Court of the District and remanding the cause to that Court for further proceedings. (Rec., p. 81.)

Thereafter the cause came on to be heard before the Supreme Court of the District, and on December 20, 1922, that Court adjudged, ordered and decreed that the Minimum Wage Law was invalid because in conflict with the Constitution of the United States and the amendments thereto, and that the defendants be enjoined, etc., as appears in the order. (Rec., p. 15.)

From that order the defendants, the Minimum Wage Board, appealed to the Court of Appeals, assigning as error (1) the action of the Court in holding the Minimum Wage Law unconstitutional; (2) the action of the Court in permanently enjoining defendants. (Rec., p. 16.)

Thereafter the appellant, the Minimum Wage Board, filed a motion to dispense with printing the Record, which was granted (Rec., p. 82), and also filed a motion to either affirm or reverse the decrees below. (Rec., p. 83.) Upon consideration thereof the Court

of Appeals acting upon the appellants' motion to affirm or reverse, passed upon the assignment of errors and ordered, adjudged and decreed that the decree of the Supreme Court be affirmed, Mr. Chief Justice Smyth dissenting. (Rec., p. 83.) Thereafter, from this final order, the Court of Appeals allowed an appeal to this Court, on motion of counsel for appellant. (Rec., p. 84.) That is the appeal now before this Court.

CONCLUSION.

The argument of counsel for appellants in support of the validity of the wage law, cannot fairly be said to rest upon any decision of this Court, except that, *assuming* this law to be within the scope of the police power he relies upon the rulings many times made and not disputed here, that Congress has a wide discretion in exercising an admitted power.

But, as has been pointed out, the question here is not one of discretion in determining the extent to which Congress may go in legislating for the public health, safety, morals or welfare *within* the police power. It is not a question of the reasonableness of the exercise of an admitted power. At the very base of the discussion is the question of the power to act at all. The question is whether the fixing of the price of labor is

within the police power at all—not whether it is a proper exercise of that power.

It will not do to say that the fixing of prices is done as a "health measure" and therefore it comes within the police power and the constitutional guaranties do not apply. By the same token it might be said that the mere existence of freedom of contract or private ownership of property, guaranteed by the Constitution, are themselves, inimical to health, morals or safety and therefore Congress has a wide discretion to restrict or eliminate them.

On the other hand, every contention of counsel for appellants in support of the validity of the law is answered in the decisions of this Court.

Forbidding that term in the contract between employer and employee by which the price is fixed by the parties has no more relation to health or morals than forbidding the term of the contract between employer and employee by which one agrees not to be a member of an association of workers. And the direct relation to health or morals does not exist when the contract is made by men, and equally it does not exist when the contract is made by women.

The question before the Court being one of *power*, because of the limitations upon legislative power in the constitutional guaranties, the statistics or opinions which induced Congress to believe the law desirable,

have no more controlling weight on the question than they would have on the question of the validity of a law requiring employers to hire none but union men, or a law forbidding them to hire aliens, or an act of Congress such as the Child Labor Tax law.

Respectfully submitted,

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APPENDIX A.

District of Columbia Minimum-Wage Law.

An Act To protect the lives and health and morals of women and minor workers in the District of Columbia, and to establish a Minimum Wage Board, and define its powers and duties, and to provide for the fixing of minimum wages for such workers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where used in this Act—

The term "Board" means the Minimum Wage Board created by section two;

The term "Commissioners" means the Commissioners of the District of Columbia;

The term "woman" includes only a woman of eighteen years of age or over;

The term "minor" means a person of either sex under the age of eighteen years;

The term "occupation" includes a business, industry, trade, or branch thereof, but shall not include domestic service.

SEC. 2. That there is hereby created a Board to be known as the "Minimum Wage Board," to be composed of three members to be appointed by the Commissioners of the District of Columbia. As far as practicable, the members shall be so chosen that one will be representative of employees, one representative of employers, and one representing the public.

The Commissioners shall make their first appointments hereunder within thirty days after this Act takes effect, and shall designate one of the three members first appointed to hold office until January first, nineteen hundred and nineteen; one to hold office

until January first, nineteen hundred and twenty; and one to hold office until January first, nineteen hundred and twenty-one. On or before the first day of January of each year, beginning with the year nineteen hundred and nineteen, the Commissioners shall appoint a member to succeed the member whose term expires on such first day of January, and such new appointee shall hold office for the term of three years from such first day of January. Each member shall hold office until his successor is appointed and has qualified; and any vacancy that may occur in the membership of the Board shall be filled by appointment by the Commissioners for the unexpired portion of the term.

A majority of the members shall constitute a quorum to transact business, and the act or decision of such a majority shall be deemed the act or decision of the Board; and no vacancy shall impair the right of the remaining members to exercise all the powers of the Board.

SEC. 3. That the first members appointed shall, within twenty days after their appointment, meet and organize the Board by electing one of their number as chairman and by choosing a secretary, who shall not be a member of the Board; and on or before the tenth day of January of each year thereafter the Board shall elect a chairman and choose a secretary for the ensuing year. The chairman and the secretary shall each hold office until his successor is elected or chosen; but the Board may at any time remove the secretary. The secretary shall perform such duties as may be prescribed and receive such salary, not in excess of $2,500

per annum, as may be fixed by the Board. None of the members shall receive any salary as such. The Board shall have power to employ agents and such other assistants as may be necessary for the proper performance of its duties: *Provided,* That until further authorization by Congress, the sum which it may expend, including the salary of the secretary, shall not exceed the sum of $5,000.

SEC. 4. That at any public hearing held by the Board any person interested in the matter being investigated may appear and testify. Any member of the Board shall have power to administer oaths and the Board may require by subpœna the attendance and testimony of witnesses, the production of all books, registers and other evidence relative to any matters under investigation, at any such public hearing or at any session of any conference held as hereinafter provided. In case of disobedience to a subpœna the Board may invoke the aid of the Supreme Court of the District of Columbia in requiring the attendance and testimony of witnesses and the production of documentary evidence. In case of contumacy or refusal to obey a subpœna the court may issue an order requiring appearance before the Board, the production of documentary evidence, and the giving of evidence touching the matter in question, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

SEC. 5. That the Board is hereby authorized and empowered to make rules and regulations for the carrying into effect of this Act, including rules and regulations for the selection of members of the con-

ferences hereinafter provided for and the mode of procedure thereof.

SEC. 6. That the Board shall, on or before the first day of January of the year nineteen hundred and nineteen, and of each year thereafter, make a report to the Commissioners of its work and the proceedings under this Act.

SEC. 7. That there is hereby authorized to be appropriated, out of the revenues of the District of Columbia, for the fiscal year ending June thirtieth, nineteen hundred and nineteen, the sum of $5,000, or so much thereof as may be necessary, to carry into effect the provisions of this Act.

SEC. 8. That the Board shall have full power and authority: (1), To investigate and ascertain the wages of women and minors in the different occupations in which they are employed in the District of Columbia; (2), to examine, through any member or authorized representative, any book, pay roll or other record of any employer of women or minors that in any way appertains to or has a bearing upon the question of wages of any such women or minors; and (3), to require from such employer full and true statements of the wages paid to all women and minors in his employment.

Every employer shall keep a register of the names of the women and minors employed by him in any occupation in the District of Columbia, of the hours worked by each, and of all payments made to each, whether paid by the time or by the piece; and shall, on request, permit any member or authorized representative of the Board to examine such register.

To assist the Board in carrying out this Act the Commissioners shall at all times give it any information or statistics in their possession under the Act of Congress approved February twenty-fourth, nineteen hundred and fourteen, entitled "An Act to regulate the hours of employment and safeguard the health of females employed in the District of Columbia." (Public, numbered sixty, Sixty-third Congress.)

SEC. 9. That the Board is hereby authorized and empowered to ascertain and declare, in the manner hereinafter provided, the following things: (a), Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals; and (b), standards of minimum wages for minors in any occupation within the District of Columbia, and what wages are unreasonably low for any such minor workers.

SEC. 10. That if, after investigation, the Board is of opinion that any substantial number of women workers in any occupation are receiving wages inadequate to supply them with the necessary cost of living and maintain them in health and protect their morals, it may call and convene a conference for the purpose and with the powers of considering and inquiring into and reporting on the subject investigated by the Board and submitted by it to such conference. The conference shall be composed of not more than three representatives of the employers in such occupation, of an equal number of representatives of the employees in such occupation, of not more than three disinterested

persons representing the public, and of one or more members of the Board. The Board shall name and appoint all the members of the conference and designate the chairman thereof. Two-thirds of the members of the conference shall constitute a quorum, and the decision or recommendation or report of the conference on any subject submitted shall require a vote of not less than a majority of all its members.

The Board shall present to the conference all the information and evidence in its possession or control relating to the subject of the inquiry by the conference, and shall cause to be brought before the conference any witnesses whose testimony the Board deems material.

SEC. 11. That after completing its consideration of and inquiry into the subject submitted to it by the Board, the conference shall make and transmit to the Board a report containing its findings and recommendations on such subject, including recommendations as to standards of minimum wages for women workers in the occupation under inquiry and as to what wages are inadequate to supply the necessary cost of living to women workers in such occupation and to maintain them in health and to protect their morals.

In its recommendations on a question of wages the conference (1) shall, where it appears that any substantial number of women workers in the occupation under inquiry are being paid by piece rates as distinguished from time rate, recommend minimum piece rates as well as minimum time rate and recommend such minimum piece rates as will, in its judgment, be adequate to supply the necessary cost of living to

women workers in such occupation of average ordinary ability and to maintain them in health and protect their morals; and (2) shall, when it appears proper or necessary, recommend suitable minimum wages for learners and apprentices in such occupation and the maximum length of time any woman worker may be kept at such wages as a learner or apprentice, which wages shall be less than the regular minimum wages recommended for the regular women workers in such occupation.

SEC. 12. That, upon receipt of any report from any conference, the Board shall consider and review the recommendations, and may approve or disapprove any or all of such recommendations, and may resubmit to the same conference, or a new conference, any subject covered by any recommendations so disapproved.

If the Board approves any recommendations contained in any report from any conference, it shall publish a notice, once a week, for four successive weeks in a newspaper of general circulation printed in the District of Columbia, that it will, on a date and at a place named in the notice, hold a public hearing at which all persons in favor of or opposed to such recommendations will be heard.

After such hearing the Board may, in its discretion, make and render such an order as may be proper or necessary to adopt such recommendations and carry them into effect, requiring all employers in the occupation affected thereby to observe and comply with such order. Such order shall become effective sixty days after it is made. After such order becomes effective, and while it is effective, it shall be unlawful

for any employer to violate or disregard any of its terms or provisions, or to employ any woman worker in any occupation covered by such order at lower wages than are authorized or permitted therein.

The Board shall, as far as is practicable, mail a copy of such order to every employer affected thereby; and every employer affected by any such order shall keep a copy thereof posted in a conspicuous place in each room in his establishment in which women workers are employed.

SEC. 13. That for any occupation in which only a minimum time-rate wage has been established, the Board may issue to a woman whose earning capacity has been impaired by age or otherwise, a special license authorizing her employment at such wage less than such minimum time-rate wage as shall be fixed by the Board and stated in the license.

SEC. 14. That the Board may at any time inquire into wages of minors employed in any occupation in the District of Columbia, and determine suitable wages for them. When the Board has made such determination it may make such an order as may be proper or necessary to carry such determination into effect. Such order shall become effective sixty days after it is made; and after such order becomes effective and while it is effective it shall be unlawful for any employer in such occupation to employ a minor at less wages than are specified or required in or by such order.

SEC. 15. That any conference may make a separate inquiry into and report on any branch of any occupa-

tion, and the Board may make a separate order affecting any branch of any occupation.

SEC. 16. That the Board shall from time to time investigate and ascertain whether or not employers in the District of Columbia are observing and complying with its orders, and shall report to the corporation counsel of the District of Columbia all violations of this Act.

SEC. 17. That all questions of fact arising under the foregoing provisions of this Act shall, except as otherwise herein provided, be determined by the Board, and there shall be no appeal from the decision of the Board on any such question of fact; but there shall be a right of appeal from the Board to the Supreme Court of the District of Columbia from any ruling or holding on a question of law included or embodied in any decision or order of the Board; and, on the same question of law, from such court to the Court of Appeals of the District of Columbia. In all such appeals the corporation counsel shall appear for and represent the Board.

SEC. 18. That whoever violates this Act, whether an employer or his agent, or the director, officer, or agent of any corporation, shall be deemed guilty of a misdemeanor; and, upon conviction thereof, shall be punished by a fine of not less than $25 nor more than $100, or by imprisonment not less than ten days nor more than three months, or by both such fine and imprisonment.

SEC. 19. That any employer and his agent, or the director, officer, or agent of any corporation, who discharges or in any other manner discriminates against

any employee because such employee has served or is about to serve on any conference, or has testified or is about to testify, or because such employer believes that said employee may serve on any conference or may testify in any investigation or proceedings under or relative to this Act, shall be deemed guilty of a misdemeanor; and, upon conviction thereof, shall be punished by a fine of not less than $25 nor more than $100.

SEC. 20. That any act which, if done or omitted to be done by any agent or officer or director acting for such employer, would constitute a violation of this Act, shall also be held to be a violation by the employer and subject such employer to the liability provided for by this Act.

SEC. 21. That prosecutions for violations of this Act shall be on information filed in the police court of the District of Columbia by the corporation counsel.

SEC. 22. That if any woman worker is paid by her employer less than the minimum wage to which she is entitled under or by virtue of an order of the Board, she may recover in a civil action the full amount of such minimum wage, less any amount actually paid to her by the employer, together with such reasonable attorney's fees as may be allowed by the court; and any agreement for her to work for less than such minimum wage shall be no defense to such action.

SEC. 23. That this Act shall be known as the "District of Columbia minimum-wage law." The purposes of the Act are to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate

to maintain decent standards of living; and the Act in each of its provisions and in its entirety shall be interpreted to effectuate these purposes.

Approved, September 19, 1918.

APPENDIX B.

Majority Opinion of the Court of Appeals.

Mr. Justice VAN ORSDEL delivered the opinion of the Court.

These cases present the question of the constitutionality of the Minimum Wage Law of the District of Columbia, Act of Congress, September 19, 1918, 40 Stat., L., 960.

By the act in question, the Commissioners of the District of Columbia were authorized to appoint a minimum wage board composed of three members. This board is vested with power, after investigation as provided in the statute, to fix the minimum wages to be paid women employees in any occupation in the District of Columbia, where the board from its investigation is of opinion that women workers are receiving inadequate wages. The act also provides that after a minimum wage has been fixed, any employer or agent, or any officer, director, or agent of any corporation, refusing to comply with the order of the board, shall be guilty of a criminal offense and upon conviction punished by fine or imprisonment, or both.

By a further provision of the act, the decision of the board, fixing a minimum wage, is made final, and no appeal to the courts from such decision is allowed except upon error of law. The board is given authority to examine the books of every individual or corporation, employing women in the District of Columbia, to ascertain the names of women employees and the wages paid, a register of which every employer is re-

quired to keep. It is made a criminal offense for any employer or his agent to discharge or discriminate in any manner against any employee who serves, or is about to serve on any conference called by the board, or who has testified or is about to testify at any conference, or any employee whom the employer believes may serve on any conference or may testify "in any investigation or proceedings under or relative to this act."

Section 13, of the act, provides: "That for any occupation in which only a minimum time-rate wage has been established, the board may issue to a woman whose earning capacity has been impaired by age or otherwise, a special license authorizing her employment at such wage less than such minimum time-rate wage as shall be fixed by the board and stated in the license."

In case No. 3438, The Children's Hospital, a District of Columbia corporation, seeks to perpetually restrain the minimum wage board from enforcing an order requiring it to pay its women employees not less than $16.50 per week, or $71.50 per month. In case No. 3467, the appellant, Willie A. Lyons, was operating an elevator in the Congress Hotel in the City of Washington, at a wage of $35 per month and two meals per day, when the board issued an order forbidding any hotel keeper to employ a woman or minor girl "at a rate of wages of less than 34½ cents per hour, $16.50 per week, or $71.50 per month." It is to restrain the enforcement of this order that appellant Lyons filed her bill in the court below.

From decrees of the Supreme Court of the District of Columbia dismissing the bills, these appeals are prosecuted.

We will not stop to analyze the records in these cases for the purpose of determining the sufficiency of the averment to sustain the prayers for extraordinary relief. The single question presented, involves the power of Congress, in the light of the limitations of the Constitution of the United States, to enact this legislation. If the act is constitutional, unquestionably the averments are not sufficient to justify the interposition of equity; but any attempt to enforce an unconstitutional law, resulting in an invasion of property rights, is subject to equitable restraint. Truax v. Raich, 239 U. S., 33. The constitutionality of the act is assailed upon the theory that the power exerted extends to the regulation and limitation of the freedom of contract between private individuals, and that it is the initial step toward unlimited Federal price-fixing legislation.

The act clearly was neither passed to meet a temporary emergency, nor "to tide over a passing trouble." Its interpretation may be pursued without reference to the modern rule of emergency resorted to in support of certain so-called war legislation; nor does it appear that any situation has arisen in the District of Columbia, in respect of women workers, which has become so "publicly notorious" as to justify the inference of an emergency. True, Congress declared the purpose of the act to be "to protect the women and minors of the District from conditions detrimental to their health and morals resulting from

wages which are inadequate to maintain decent standards of living." It then undertakes to direct the interpretation of the act and forbids appeal to the courts, except upon questions of law. While statements of fact by a legislature, as an inducement for the enactment of a law, are entitled to respect, they are by no means conclusive upon the courts; nor are the limitations upon interpretation and appeal, since the courts will have the last word in the event of any arbitrary action on the part of the board in carrying out the provisions of the act.

Another contention may be disposed of in a word. True, a number of states have enacted similar laws and they have generally been upheld by the state courts, but that by no means forecloses consideration of the present case. In Coppage v. Kansas, 236 U. S., 1, the court condemned an act making it a criminal offense for an employer to prevent, by contract, his employees joining labor unions, notwithstanding such laws existed in thirteen states and the territory of Porto Rico.

We are here called upon to weigh the subject-matter of certain legislation in the balance of the Constitution, the general power of Congress to fix wage contracts between private individuals. If Congress may establish a minimum wage for women, it may establish a maximum wage, or it may name a fixed wage. If it may regulate wages for women, it may by the exercise of the same power establish the wages to be paid men. The power of Congress to fix wages between private individuals is either constitutional or unconstitutional. There is no leeway for legislative or judicial discretion.

A fundamental principle is involved; and it does not lie in the courts to declare a law fixing the wages of women constitutional and a law fixing the wages of men unconstitutional. The moral stimulus in the one instance is no greater than in the other. If higher wages are essential to preserve the morals of women, they are equally essential to preserve the morals of men.

This leads to another angle. If the law is to be equitably enforced, it requires a most careful and judicious inquiry by the board into living conditions—the cost of rent, clothes, food and recreation. If the power, therefore, exists to fix wages in the interest of good morals and the promotion of the general welfare, the power must likewise be conceded to fix the prices of all commodities entering into the determination of an equitable wage. In no other way can justice be accorded. The wage fixed for an employer to pay his employee can not be justified if based upon the unrestrained prices which the employee may have to pay the merchant for food and clothes, or the landlord for rent. The logical result of such a course relegates the whole matter of prices to the realm of legislation.

The liberty protected by the Fifth and Fourteenth Amendments to the Constitution includes the freedom of contract and the right to contract with relation to one's business. "It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the Fourteenth Amendment." Muller v. Oregon, 208 U. S., 412, 421. In Coppage v. Kansas, 236 U. S., 1, 14, the court, af-

firming the doctrine announced in the Muller case, said: "The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."

The public safety and welfare may justify the legislature in limiting the hours of labor in mines and other hazardous industries, and require safeguards to be employed in conducting dangerous occupations. Such regulations, however, affect only the mode of operation and do not invade the domain of prices. They are easily distinguished from the purely economic question of how much the employer shall pay the employee for his services. In one case the business conducted is so inherently dangerous that its regulation, as to methods of operation, becomes a valid exercise of the police power. The public health and safety demand, not that the business be confiscated, not that proprietorship therein be curtailed or limited, not that the economic control thereof may be in the least affected, but that the business be so conducted that the public health and safety may not be seriously endangered.

Legislation tending to fix the prices at which private property shall be sold, whether it be a commodity or labor, places a limitation upon the distribution of wealth and is aimed at the correction of the inequalities of fortune which are inevitable under our form of government, due to personal liberty and the private ownership of property. These principles are embodied in the Constitution itself, and to interfere with their freedom of operation is to deprive the citizen of his constitutional rights. In other words, regardless of public sentiment or popular demand, such a radical change, if deemed necessary, should not be accomplished by legislative enactment or judicial interpretation, but by way of amendment in the orderly way provided.

Alexander Hamilton, whose keen vision seems to have forecast the dangers that would arise in the future, threatening the stability and the life of the republic, left a timely warning against attempted legislative or judicial amendment in response to public clamor. He declared it to be a "fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions of the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than

when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authorative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community." The Federalist, Chap. 78.

The police power can not be employed to level inequalities of fortune. Private property can not by mere legislative or judicial fiat be taken from one person and delivered to another, which is the logical result of price-fixing. As was said by Mr. Justice Pitney, in the Coppage case: "But the Fourteenth Amendment, in declaring that a state shall not 'deprive any person of life, liberty or property without due process of law,' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as co-existent human rights, and debars the states from any unwarranted interference with either. And since a state may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other objects in view. The police power is broad, and not easily de-

fined, but it can not be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."

In Frisbie v. United States, 157 U. S., 10, 166, the court, after reviewing a number of instances in which the police power had been validly exercised, made the following pertinent exception· "The possession of this power by the government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

But it is suggested that the act may be sustained, since Congress is legislating for a class. The constitutional limitations upon Congress involve fundamental principles of human rights reserved to the whole people and not to any favored class of citizenship. They are for the protection alike of the rich and the poor, the strong and the weak, the high and the low, and may not, either by legislative or judicial fiat, be used to extend special protection or privileges to any particular class of citizens. No reason is apparent why the operation of the law should be extended to women to the exclusion of men, since women have been accorded full equality with men in the commercial and political world. Indeed, this equality in law has been sanctioned by constitutional amendment; and so fixed has the tendency in this direction become established in English speaking lands, that the opportunity for official and business preferment, upon complete equality with men, is limited only by the scope of her aspirations.

The right of Willie Lyons to contract her labor in any lawful calling is a property right, of which, if the property clauses of the constitution mean anything, she can not be deprived. When the minimum wage of $71.50 per month for women was fixed by the board in this District, Willie Lyons was operating an elevator in the Congress Hotel at a wage of $35 per month and two meals per day. As a result she lost her position. The law worked but one way. The hotel manager was not compelled to employ her at a fixed wage, and her position went to a man, who was willing to perform the service at a lower wage that that fixed by the Board. She was without the power to compel her employment, and, because of her inability to measure up to the minimum scale, the law to promote the good morals and general welfare of the community cast her adrift. She was not even in position to avail herself of the provisions of section 13, of the act, since she was fully qualified to perform the work for which she was employed. Her earning capacity as an elevator operator, was not "impaired by age or otherwise." The only way, therefore, by which she could have been saved from competitive injury would have been to have fixed the minimum wage of elevator operators at $32.50 per month and two meals per day. Unless, therefore, the board is to be accorded arbitrary power, section 13 has no application to her case.

The sacredness of the right of the citizen to freely contract his labor was upheld in Adair v. United States, 208 U. S., 161, 174, where the court, speaking through Mr. Justice Harlan, said: "The right of a person to sell his labor upon such terms as he deems

proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. * * * In all such particulars the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

We come now to the consideration of two recent cases upon which counsel for appellee chiefly rely. In Wilson v. New, 243 U. S., 332, known as the Adamson Law case, the court was considering a statute establishing an eight-hour working day for railway employees on interstate railroads, and incidentally providing that the then existing scale of wages should be continued in force until the parties could agree. The court clearly pointed out that the law constituted a regulation of a business impressed with a public interest. It affected an instrumentality of interstate commerce, the control of which, is expressly reserved to Congress in the Constitution. The court held that Congress not only had power to legislate for the protection of the public interest in keeping open the channels of commerce, but possessed authority to regulate matters incidental to the proper exercise of that power. In upholding the provisions of the act continuing the wage scale in force until the parties could agree, the court said: "And this emphasizes that there is no question here of purely private right since the law is concerned only with those who are engaged in a business charged with a public interest where the subject dealt with as to all the parties is one involved in that

business and which we have seen comes under the control of the right to regulate to the extent that the power to do so is appropriate or relevant to the business regulated."

In no respect did the court even intimate that the power of Congress to fix wages for railway employees could be invoked, except where, through failure of agreement, commerce is jeopardized. The authority of Congress is expressed in the opinion in a single sentence: "Here again it is obvious that what we have previously said is applicable and decisive, since whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applied and the resulting right to fix in case of disagreement and dispute a standard of wages as we have seen necesssarily obtained."

The Adamson Law was not a wage-fixing statute and the court so held. The power of Congress to continue the wage scale in force, was limited to its power to legislate generally in respect to commerce, and to the failure of the parties to agree upon a satisfactory scale of wages. In no place is it intimated that Congress, even in the exercise of its delegated authority to regulate commerce, would have power to legislate upon the question of wages where an agreed scale existed.

In Block v. Hirsch, 256 U. S., 135, involving the validity of the Ball Rent Act for the District of Columbia, the court held the renting of property in the District of Columbia, under existing conditions, to be a business affected with a public interest. The act, however, was upheld only when the theory that the power to fix rentals is limited to an existing emergency. The act was held to be a temporary measure "made necessary by emergencies growing out of war * * * embarrassing the Federal Government in the transaction of the public business." This act was passed to correct an abuse which had become "publicly notorious," and the emergency which had made this condition possible was held to justify the act. "The regulation is put and justified only as a temporary measure. See Wilson v. New, 243 U. S., 332, 345, 346. Fort Smith & Western R. R. Co. v. Mills, 253 U. S., 206. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."

In the recent decision of the Supreme Court of the United States, Edgar A. Levy Leasing Co., Inc. v. Jerome Siegel, — U. S. — upholding the New York Rent Law, the court, placing its decision upon the same basis as in the Hirsch case, said: "In terms the acts envolved are 'emergency' statutes and, designed as they were by the legislature to promote the health, morality, comfort and peace of the people of the state, they are obviously a resort to the police power to promote the public welfare. They are a consistent interrelated group of acts essential to accomplish their professed purposes. The warrant for this legislative re-

sort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the state a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the state. That such an emergency, if it really existed, would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it can not be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual basis and justification, for exercise of that power."

We are of the opinion that the act can not be upheld upon the theory that the contracting for labor between private individuals is a business impressed with a public interest. Unlike the operation of an elevator to handle indiscriminately the grain of the public, and the rates to be charged for such service, (Munn v. Illinois, 94 U. S., 113), or the trust relation arising from the depositing of funds in banks, (Noble State Bank v. Haskell, 219 U. S., 104), or the rates to be charged the public by insurance companies, (German Alliance Insurance Company v. Kansas, 233 U. S., 389), we are here dealing with a private business, conducted between private individuals, in which the public has no direct economic interest. It follows, therefore, that if the doctrine of "public interest" is to be extended to the point of fixing by law the rate at which the individual citizen may contract his labor, by placing a limitation upon the freedom of private contract

between employer and employee, it is difficult to understand just where the limitations of the extension of police power may be reached. It amounts to converting the police power into a convenient experimental agency for distinguishing, extending or abrogating express limitations of the Constitution.

The difficulty arises, we think, from the failure to distinguish between legislative discretion and legislative power. A mere declaration of necessity assumes the existence of power to act, and where there is power, legislative discretion, in its exercise, will be accorded favorable presumption; but if there is a total lack of power, no jurisdiction is reposed in the legislature to determine for itself the possession of the power, and a declaration to that effect is without persuasive force. As the court said, in Truax v. Raich, supra: "We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly, but underlying the classification is the authority to deal with that at which the legislation is aimed." We are here dealing with the power of Congress to restrict freedom of contract which is expressly guaranteed in the Constitution. In the Coppage case, the court held that "the mere restriction of liberty or of property rights can not of itself be denominated 'public welfare' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the (Fourteenth) Amendment."

Coming now to the consideration of the vindication of the act as a proper exercise of the police power, we are of the opinion that it can not be upheld. High wages do not necessarily tend to good morals, or the

promotion of the general welfare. The standard of virtue and morality is no higher among the prosperous than among the poor. Their worth can not be measured in dollars and cents, or promoted by a legal subsidy. Never have wages been so high as since the outbreak of the late war, and never in the history of the republic has crime been so universal; and this condition, it must be conceded, has made a like unfavorable impression upon the morals of the people. A wage based upon competitive ability is just, and leads to frugality and honest industry, and inspires an ambition to attain the highest possible efficiency, while the equal wage paralyzes ambition and promotes prodigality and indolence. It takes away the strongest incentive to human labor, thrift and efficiency, and works injustice to employee and employer alike, thus affecting injuriously the whole social and industrial fabric. Experience has demonstrated that a fixed minimum wage means, in the last analysis, a fixed wage; since the employer, being compelled to advance some to a wage higher than their earning capacity, will, to equalize the cost of operation, lower the wage of the more competent to the common basis.

Any intimation that the Constitution is flexible, even in response to the police power, is unsound. Powers expressly delegated by the Constitution—such, for example, as the regulation of interstate commerce—may be extended to meet changing conditions, providing it can be accomplished without altering fundamental principles; but the principles are immutable, not elastic or subject to change. That a state may not impair the obligations of a contract, or that no person

can be deprived of his property without due process of law, are principles fundamental, and if the legislature, in response to public clamor for an experimental social reform, may break down these constitutional guaranties by calling an act a "health law," or a "public morality law," or a "public welfare law," all guaranties of the Constitution, under the alleged exercise of the police power, may be changed, modified or totally eliminated.

Nor is the extent of such modification a matter of judicial discretion. To hold that the courts may declare a law, violating the same principle, constitutional under one state of fact, and unconstitutional under another, is the exercise of arbitrary power—a power said to exist nowhere in our system of government. And nowhere could it be lodged with more dangerous results than in the courts.

The tendency of the times to socialize property rights under the subterfuge of police regulation is dangerous, and if continued will prove destructive of our free institutions. It should be remembered that of the three fundamental principles which underlie government, and for which government exists—the protection of life, liberty and property,—the chief of these is property,—not that any amount of property is more valuable than the life or liberty of the citizen, but the history of civilization proves that when the citizen is deprived of the free use and enjoyment of his property, anarchy and revolution follow, and life and liberty are without protection.

The highest freedom consists in obedience to law, and a strict adherence to the limitations of the Consti-

tution. In no way can the freedom of the citizen be more effectually curtailed and ultimately destroyed than by a deprivation of those inherent rights safeguarded by our fundamental law. The security of society depends upon the extent of the protection afforded the individual citizen under the Constitution against the demands and incursions of the government. The only tyranny the citizenship of this republic need fear is from the government itself. The character and value of government is measured by the security which surrounds the individual in the use and enjoyment of his property. These rights will only remain secure so long as the Bill of Rights—the first ten amendments of the Constitution—are construed liberally in favor of the individual and strictly against the government. They were early adopted because of a wide-spread apprehension that the time might come when the government would assume to trespass upon those inalienable individual rights announced in the Declaration of Independence and afterwards incorporated in the Bill of Rights. Courts, therefore, should be slow to lend aid to the government in this modern tendency to invade individual property rights. "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted

more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis." Boyd v. United States, 116 U. S., 616, 635.

No greater calamity could befall the wage earners of this country than to have the legislative power to fix wages upheld. It would deprive them of the most sacred safeguard which the Constitution affords. Take from the citizen the right to freely contract and sell his labor for the highest wage which his individual skill and efficiency will command, and the laborer would be reduced to an automaton—a mere creature of the state. It is paternalism in the highest degree, and the struggle of the centuries to establish the principle that the state exists for the citizen, and not the citizen for the state, would be lost.

If, in the exercise of the police power for the general welfare, power lies in the legislature to fix the wage which the citizen must accept, or choose idleness, or, as in the case of Willie Lyons, be deprived of the means of earning a living, it is but a step to a legal requirement that the industrious, frugal, economical citizen must divide his earnings with his indolent, worthless neighbor. The modern tendency toward indiscriminate legislative and judicial jugglery with great fundamental principles of free government, whereby property rights are being curtailed and destroyed, logically will, if persisted in, end in social disorder and revolution. Let no one imagine for a moment, that our civilization is such that property

rights can thus be socialized without the grossest abuse of the privileges granted, or that the restraint of the abuses can be left with safety to legislative or judicial discretion.

The decrees are reversed with costs, and the causes remanded for further proceedings, not inconsistent with this opinion.

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WM. R. STANSBU
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

Nos. 795 and 796.

JESSE C. ADKINS, ET AL., CONSTITUTING THE MINIMUM WAGE BOARD OF THE DISTRICT OF COLUMBIA,
Appellants;

vs.

THE CHILDREN'S HOSPITAL OF THE DISTRICT OF COLUMBIA, A CORPORATION.

JESSE C. ADKINS, ET AL., CONSTITUTING THE MINIMUM WAGE BOARD OF THE DISTRICT OF COLUMBIA,
Appellants,

vs.

WILLIE A. LYONS.

ORAL ARGUMENT OF WADE H. ELLIS

MINIMUM WAGE LAW FOR THE DISTRICT OF COLUMBIA

ORAL ARGUMENT OF WADE H. ELLIS

I

Popular Opinion of the Law

If it please the Court:

At the very threshold of this argument I call the Court's attention to a significant circumstance disclosed in the main brief for the appellants. They devote a few prefatory pages, designated by Roman numerals, to a discussion of the constitutionality of this act, and they follow this in two large volumes with 1138 pages of speeches, reports, magazine articles and statistics concerning the operation of wage laws in certain European countries and in several of the American states—all for the purpose apparently of showing that there is a widespread belief in the necessity of this sort of legislation, and that these expressions of opinion ought, in some way, to influence the issue, regardless of constitutional limitations.

Now, I take it that these views of the proponents of minimum wage laws, and these arguments in favor of such laws set forth by members and employes of wage commissions, or by those seeking the passage of such laws and the creation of such boards, are not before the Court.

I take it that the question as to whether or not the supreme law of the land conflicts with the enactment under consideration is not to be tested by some vote presented in the brief of counsel. If this act is constitutional it is unnecessary to show that there is any public sentiment in favor of it; if it is unconstitutional it cannot be sustained no matter how many people desire it. But to whatever extent such considerations may be regarded I challenge the contention that seems to be implied in this argument that there is a great body of public opinion in this country preferring a legislative interference in the matter of wages between employer and employe rather than an adherence to our long-established and fundamental principles of private property and individual liberty in the making of contracts, and equal opportunity in the right to work.

This act of Congress is supposed to be for the benefit of women. I challenge the suggestion that the great body of women in this country, or any considerable number of them, prefer the fixing of wages for women while men are free to enjoy their liberty of contract. I refute the implication that the women of the United States who have just been given the elective franchise and put upon an equality with men in all political rights, now desire to be classed with incompetents and children as wards of the nation or the state in the conduct of their private business. The greatest organization of men in industry—the American Federation of Labor—as is well known, strenuously opposes wage fixing by law. Mr. Gompers, several years ago in discussing such a proposition said:

> "The same law may endeavor to force men to work for a minimum wage scale, and when government compels men to work for a minimum wage that means slavery." (E. F. McSweney in American Labor Legislation Review, February, 1913.)

The position of the American Federation of Labor is strongly stated in the official report of the executive council of that organization at the 33rd annual convention, as follows:

> "If it were proposed in this country to vest authority in any tribunal to fix, by law, wages for men, labor would protest by every means in its power."

So the report of the executive committee of the American Federation of Labor, accepted and adopted by the whole body, declared just as earnestly against wage laws for women, saying:

> "It is now a recognized fact that the work of women is a part of the industries of our country * * *
>
> "Under modern industrial conditions women are recognized as distinctive workers and their labors are compensated individually. This new condition has contributed to develop a spirit of independence, self-assertion and resourcefulness on their part * * *
>
> "Working women have found that their industrial problems are in no wise different from the industrial problems that confront men. Industrial welfare cannot be worked out on a sex basis. * * *
>
> "Women must become equally resourceful and independent as men or else progress is retarded."

Of course it is obvious that once the power to fix wages is conceded, the power follows to make the bargain between employer and employes in all cases. Can it be that the women of this country favor such laws, and especially for them alone? In my own investigations I have found an overwhelming sentiment just the other way. All over the country today thoughtful and progressive women are contending for industrial equality which follows as a natural and logical sequence to political equality. I find, for example, that in the most

recent conference or congress of the working women of the world, held at Geneva, Switzerland, in 1921, it was voted that all social legislation should benefit the workers, irrespective of race, religion or sex. It is true that there are not great organizations of women workers to whom we can point for an expression of opinion, but there are a number of organizations vitally interested in this very question.

There is the National Woman's Party, for example. Its position is stated as follows:

> "The National Woman's Party stands for equality between men and women in all laws. This includes laws affecting the position of women in industry, as well as all other laws. The Woman's Party does not take any position with regard to the merits of the minimum wage legislation but demands that such legislation, if passed, shall be for both sexes. It is opposed to all legislation having a sex basis and applying to one sex alone."

I find the President of the National Woman's Suffrage Association, Mrs. Carrie Chapman Catt, saying:

> "It is more important than any other consideration at this time, that every human being who is obliged to earn his or her own living have absolute freedom to find any employment which seems suitable and profitable, without discrimination or restrictions of any kind."

I find the body of women who are organized under the name of the Equal Rights Association protesting against minimum wage laws "because they impair the individual's freedom of contract, contrary to the provisions of the federal Constitution."

The Legislative Chairman of the Equal Rights Association (Nora Stanton Barney) in a speech before the Woman's Party in this city recently said:

"Women always were citizens, now they are voters, but are they still to be classed as wards? * * *

"These organizations (referring to Equal Rights Association and Woman's League for Equal Opportunity) are composed of about six thousand women who are industrial and business women, and they represent 2,600 different trades which have felt a great handicap to women in having special laws that apply to women only * * *.

"For in this country there are lined up on the one side these working women, and on the other side there are whole groups of organizations that are trying to put over special laws for women."

So I find resolutions adopted by the Federation of Business and Professional Women's Clubs opposing minimum wage laws for women. There is evidence everywhere among women of an effort to secure industrial equality, and to prevent discrimination or restrictions based upon sex. Even as this case is being heard a proposed bill in the state of New York undertaking to control the wages of women, is being opposed by the women themselves.

And it is a remarkable fact that in all these hundreds or thousands of pages appended to appellant's brief containing the opinions of well meaning enthusiasts, and the reports or reviews of minimum wage boards written by the members or employes of the boards, there is an ominous silence on the part of the women themselves for whose benefit the social reform is agitated.

II

Effect of Wage Fixing for Women

Now, no one doubts the beneficent and humanitarian purpose of such laws, and no one impugns the sincerity

of those who advocate them; but that they are inimical to the highest and best interests of women, thus justifying the opposition they encounter from among the very class intended to be benefited, is shown by the working of the laws themselves, and in some very striking instances by the reports of the Minimum Wage Board for the District of Columbia as disclosed in appellant's brief. For example, they show in various industries, such as department stores, printing plants, restaurants and hotels, that where the orders of the Board were obeyed the number of employes getting less than the minimum wage, was reduced, and the number of employes getting the minimum wage was increased. This was to be expected, of course. But they do not show the effect upon wages of those who were getting *more* than the minimum required by the order. What they tend to show is merely a leveling of wages, and no study or analysis of these figures can be made without compelling the conclusion that the more advanced and experienced workers were required to suffer a reduction in order to make up the minimum wage for the less competent. It nowhere appears that the total wage bill of the industries affected by the order was increased. In other words, the whole tendency of such laws is to lower higher wages rather than to raise lower wages. For example, the Board sets out, in Table II (p. 36) the number and per cent of women and minors in 182 mercantile establishments in the District of Columbia receiving below, at and above the minimum wage rate at certain specified periods, under the operation of the statute. And this shows that for the last year covered by the report (1922) the number of employes whose wages were raised to the minimum, increased; while the number getting above the minimum decreased.

So in Table 12 (p. 37) for the same period, the number of female employes in eleven identical hotels, whose wages were raised to the minimum, increased, while the number of those getting over the minimum decreased. On the other hand, practically every table shows that the total number of females employed in the various establishments in the District of Columbia decreased under the operation of this law. For example, the number of females employed in the printing establishments was reduced by about 10 per cent; the number employed in the five and ten cent stores was reduced about 10 per cent, while the number employed in the restaurants was reduced about 25 per cent.

No wonder some one has characterized such laws as "protecting women out of their jobs." And the tendency, of course, where minimum wage laws are enforced, is to discharge those getting and earning by their capacity and superior training, ambition and efficiency, the higher wages, not affected by the regulation, and filling their places with the less competent and less efficient, who would be willing to work for the minimum wage.

Another striking fact disclosed by the report of the Minimum Wage Board of the District of Columbia, as set forth in appellant's brief, is the admission, quite seriously made, that wherever a union of the women workers was organized the pressure of their collective bargaining had a more beneficial effect upon their wages than the official interposition of the Board. For example, in the printing trade the Minimum Wage Board says (Table 5, p. 15):

> "To women workers themselves is due most of the credit for the increase in wages shown since March, 1920. Through their union they have obtained by agreement with the employers a minimum wage of $20 per week, etc."

If they had depended upon the Board the minimum would have been $15.50 per week.

As we have pointed out, the practical difficulty of substituting for the competitive or market value of labor, the opinion, expressed in some arbitrary figure as to what is a "living wage," is shown over and over again in the varying, inconsistent and contradictory orders and regulations not only of the Minimum Wage Board in the District of Columbia, but of similar commissions wherever they have been established. For example, the minimum wage fixed for women for the same work is $7.50 per week in Arkansas; $12.00 in Kansas; $13.20 in the state of Washington; and $16.50 in the District of Columbia.

In California two organizations undertook to determine what constitutes the minimum cost of living for women. One made the weekly budget $11.78 and the other $21.20. So in the city of Washington. The Minimum Wage Board here fixes the wages of a woman working in the hotels at $16.50 per week, declaring that this is the very least she can decently get along with, and then fixes the wages of women working in a laundry at $9.00 per week. It is difficult to see what there is about laundry work which reduces for the worker the cost of clothing and food and shelter.

The experience of Willie Lyons, plaintiff in one of these actions, is typical of the practical working of a minimum wage law for women. She had a position as an elevator operator in one of the local hotels. She got $35.00 a month and two meals a day. These two meals, even at the rate allowed by the Minimum Wage Board, amounted in value to $18.00 per month additional, or a total of $53.00 per month. Of course, the actual value was far greater than this, and the meals, if she had to buy the same food herself, would no doubt have cost not

less than $1.50 per day or $45.00 per month, so that her place was really worth to her $80.00 per month. Whether she earned anything in addition by way of tips or gratuities, does not appear. But, at any rate, she was satisfied with the terms of her employment—contented in her work, and she wanted to keep her job. But the Minimum Wage Board said this woman needed special police protection. They ordained that she must get $71.50 per month, without regard to meals. And so she lost her job. And now, if she looked about to run another elevator, and this time for the government of the United States, she would find that her wages under the new reclassification act, just adopted, would be not $35.00 per month and her board, making a total of about $80.00 per month, and not $71.50 per month as fixed by the Minimum Wage Board, but her pay in the government service would be about $50 per month and feed herself. And if she became a charwoman for the government her wages would be as low as $20 per month.

Counsel for the wage board in this case suggest that in some way Willie Lyons was induced to bring this action against her own interest. They seek to make it appear that this is a "friendly suit." If it is, it certainly does not appear that there is any occasion for friendliness on the part of Willie Lyons toward the Minimum Wage Board. I suppose if those who earnestly believe in these protective laws for women could express their full conviction, they would deny to this plaintiff the right to sue, as one who does not know what is best for her.

The women of this country are entitled to a little more respect than that. They want, and they deserve, equal rights with men. They believe in self-reliance, independence and character. And they believe that the right to make their own bargains will result ultimately in better pay, a finer sense of self-respect and a higher

quality of citizenship. They are learning from experience that minimum wage laws are not discriminations in their favor but discriminations against them. They are learning that if public authorities in establishing wages for them fix the amount below the competitive value of the service the law-made wage won't help them; and, on the other hand, if the wages are fixed above the competitive value of the service it will drive them out of employment.

III

As to the Claim that there is a "Great Body of Law" in this Country that Will be Upset by Declaring this Act Unconstitutional.

Counsel for appellants contend that there is in force today a "great body of laws" establishing minimum wages for women in a number of states which would be upset if this act is declared unconstitutional. They cite 13 states as having such laws. In the first place, the law declared to be unconstitutional in the Coppage case which undertook to forbid employers to agree with their workmen that the latter would not be members of labor unions, affected enactments in 14 states (California, Colorado, Connecticut, Indiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Porto Rico and Wisconsin). But this fact, of course, could not deter the Court from vindicating the supreme law of the land.

The "great body of law" to which counsel for appellants calls attention, will bear investigation. In six or seven of the thirteen states given the laws are dead letters and are not in force (Arizona, Colorado, Massachusetts, Texas, Utah, Porto Rico). In one (Texas) the law has been repealed and proposed new ones recently vetoed

as unconstitutional on the opinion of the attorney general of the state. In several (Kansas, which makes it unlawful to employ women "under conditions or to wages detrimental to their health;" Wisconsin (which provides that any employer paying women less than "living wage" is guilty of violation of law), the statutes are clearly void for uncertainty. On the other hand, there is a current of opinion, much stronger, which is setting in in the other direction—that is, to secure the abolition of all discriminations against women by restrictive labor laws. Such a law has been passed in Wisconsin and is being urged in a number of states. Such opinion has defeated wage laws for women in Ohio, Oklahoma and probably several other states. While mere failure to act may not be a test of opinion it is surely of some significance that great states like New York, Massachusetts, Pennsylvania, Connecticut, New Jersey, Illinois and many others, which have worked out elaborate systems of labor laws (compensation for injuries, hours of service, etc.) have no compulsory wage fixing statutes. As against the six western states that have tried this experiment, the constitutionality of which has already been determined to be doubtful at least, we have 37 states which have refused to try it.

In short, this movement for minimum wages for women which started about 1912, when, as I recall, the Progressive Party declared in favor of it, has since been subsiding everywhere. No representative organization of citizens, either political or economic, has ever before or since favored such an experiment unless it be some sections of the Socialist or Communist parties; and there is abundant evidence that recent public opinion, particularly among the women themselves, is against legislation of this character.

IV

Circumstances Surrounding the Passage of this Law by Congress

The circumstances under which this Minimum Wage Law was passed by Congress in September, 1918, completely refute the claim of its sponsors and defenders that there was any public sentiment for such legislation, any facts before the legislative body showing conditions of health, morals or safety that justified such a remedy, or any interest whatever in the measure outside the little band of well meaning proponents who have been fostering this movement from the beginning.

The Congressional Record for September 13th, 1918, in which the proceedings of the Senate appear, throws a flood of light upon the whole situation; and if, as insisted by appellants, this act is an exercise of the police power to which the rights of private property and freedom of contract guaranteed by the Fifth Amendment must yield, it is appropriate and customary to inquiry as to what was before the legislative body at the time the measure was adopted.

In the first place it appears (Congressional Record, p. 11143) that at the time this bill was first reported to the Senate, up for discussion and made the unfinished business, there were not more than six senators on the floor. Next, it appears that on the day of its passage because of the parliamentary procedure, the bill having been already read the third time, it was not open to any amendment whatever except by unanimous consent, and this consent was on several occasions refused.

Finally, it appears that the bill was passed by the votes of 36 senators for it, 12 against it and 47 senators not voting. Thus it became a law by the votes of a

little more than one-third of the Senate, and with practically no real consideration. In the midst of the general lack of interest there was just one speech made upon the bill, and that against it, upon constitutional grounds, by an able and distinguished lawyer (Senator James A. Reed of Missouri) who, though in a hurried and impromptu way, put the case so forcibly and convincingly that I want to adopt, as a part of my argument, some portion of his remarks. He said:

> "I deem it highly unfortunate that a bill involving the principle that this bill contains, should have reached the point where it cannot even be amended, and this, I understand, without any substantial discussion. * * * This much, however, is plain: The bill seeks to take away the right of private contract.
>
> "Mr. President, it may be that this legislation will go through notwithstanding any protest. It is of that class of legislation which repudiates the right of an American citizen to take care of himself. It is based upon the idea that the human family must be constantly in leading strings and under tutelage and protection. It assumes that the American citizen has not sufficient sense to make his own bargains, but that there are some other American citizens who can, with absolute infallibility make contracts for him. It is based upon a principle of intellectual serfdom. Its underlying thought is that individual rights and responsibilities should be merged into general governmental supervision. If we have this sort of legislation long enough, we will not have left in this world anything but a few political bosses and many industrial slaves.
>
> "There never was a time in the history of the world when there was as little reason for bringing forward such legislation * * *."

Here the Senator was interrupted by the Senator from Iowa (Mr. Kenyon) who said:

> "Does the Senator understand that the bill applies only to women and minors under 18 years of age, who have always been under peculiar guardianship? It applies to women and boys who cannot vote."

Then the Senator from Missouri proceeds:

> "Do women need protection? Are women unable to take care of themselves? Do women need guardians in this day when my distinguished friend is insisting that they are so much more capable of running the government than men that we should have them vote in order to improve the Government. Yet you, by this bill, class them with children and put them in the contemptible position of guardianship. In one breath you are standing here telling us they are capable of performing all the duties of citizenship; that they ought to be allowed to vote upon every question, local and national; that they should be made eligible to all offices of honor, of profit, and of trust; and that they are entitled to these privileges because of their intellectual equality if not their mental superiority over men, and in the next breath you say they are children and they need guardians and commissions to look after their wage. Where now are the knightly ladies whose flaunting banners have recently been borne back and forth in front of the White House and who have demanded with militant processes militant rights? Where are they, that they do not rise to repudiate and denounce this ignominious classification with infants, this demand that they be placed under tutelage, and that they have appointed for them guardians ad litem who will look after every contract they make for their wages * * *.
>
> "Mr. President, I warn the Senate, and I warn the country, that this is the last time of all times when

> we should break down the old fundamentals of our Constitution and of our law. I know that the mention of the Constitution provokes a smile. It has become a byword and a reproach, but it is bottomed upon eternal principles that cannot be destroyed without the world paying the penalty of that destruction."

At this point the Senator was interrupted by the Senator from Iowa:

> "I should like to ask the Senator if he contends that this law is unconstitutional?"

"Yes, sir," was the reply. "I contend that it violates the fundamental principles the Constitution was framed to protect."

Then the Senator from Iowa says:

> "I will say to the Senator that this bill is framed after the bill passed by the Oregon legislature which went to the Supreme Court of the United States. * * * And it was affirmed by the Supreme Court of the United States That case involved the identical question."

Thus it appears that the members of the legislative body who voted for this act, and who owed a primary obligation themselves to reject it if it offended against the supreme law of the land, passed the bill upon the express assurance by its chief sponsor, not challenged or denied, that the Oregon statute, asserted to be identical in terms, had been specifically upheld by this Court, and this despite the fact that the disposition of the Oregon case, by an equal division of the Court, makes that case no authority whatever, either for or against the constitutionality of the act involved. (*Hertz* vs. *Woodman*, 213 U. S. 205).

In connection with the proceedings before the Senate the claim is made in the brief for appellants (Vol. I, p. 41) that the Merchants & Manufacturers' Association of this city, favored the minimum wage law, and that this, as stated by the Senate Committee, "is the strongest argument in its favor." In the course of the debate in the Senate a very interesting colloquy took place. One of the sponsors for the bill (Senator Trammell of Florida) had stated that the bill should be supported because the local merchants and manufacturers were in favor of it. And, later, that the bill should be supported because the employing class was against it. When asked how both reasons could be correct he said:

> "Merchants or employing classes will possibly acquiesce in or agree to a measure when they are not solicitous about having it passed. I stated they did have their man come before the committee and he agreed to the legislation; that they would not oppose the legislation."
>
> "Then," said the Senator from Missouri, "if I understand the Senator's position it is this—that they do not exactly agree to it, but that they do not exactly disagree to it; that they do not exactly want it, but they were not exactly opposed to it."

That, apparently, is the basis for appellant's contention that everybody in Washington was in favor of this measure, including even the Merchants & Manufacturers' Association.

V

Wage Laws Are Not Health Laws

The proposition of the plaintiff in error, put succinctly, is this:

That if a certain minimum wage is necessary to conserve the health, morality and general welfare of the

worker, that wage can be exacted by law from the employer in the exercise of the police power, without regard to the value of the service and in derogation of the right of the employer and the employe to make their own contract.

Now, I deny this proposition in toto and for the following reasons:

First. Wage laws are not health laws at all. There is no direct or immediate relation between health, morality and general welfare, on the one hand, and wages on the other. High wages, and resulting extravagant living, may be as detrimental to health as low wages. As respects morality and the general welfare the Court below in the present case well states the matter thus:

> "High wages do not necessarily tend to good morals, or the promotion of the general welfare. The standard of virtue and morality is no higher among the prosperous than among the poor. Their worth can not be measured in dollars and cents, or promoted by a legal subsidy. Never have wages been so high as since the outbreak of the late war, and never in the history of the republic has crime been so universal. * * * A wage based upon competitive ability is just, and leads to frugality and honest industry, and inspires an ambition to attain the highest possible efficiency, while the equal wage paralyzes ambition and promotes prodigality and indolence. It takes away the strongest incentive to human labor, thrift and efficiency, and works injustice to employe and employer alike, thus affecting injuriously the whole social and industrial fabric. Experience has demonstrated that a fixed minimum wage means, in the last analysis, a fixed wage; since the employer, being compelled to advance some to a wage higher than their earning capacity, will, to equalize the cost of operation, lower the wage of the more competent to the common basis."

But if *low* wages affect the health to any degree, of course *no* wages affect the health to a greater degree. And by the same token envy generally may affect the health and therefore it could, with equal propriety, be contended that it is within the police power of Congress or the states to level all fortunes. Hunger is certainly disastrous to the health, and therefore the hungry ought to be fed from the plenty of the well-to-do.

But it is claimed by appellants that there is some special or peculiar relation between the employer and the employe in private industry which justifies the public authority in exacting a contribution from the one for the benefit of the other. No argument could be more specious than this. In a sense all society is divided into employers and employes, and to exact from *each* employer a contribution for *each* of his employes, is only another way of exacting from *all* employers for the benefit of *all* employes. It is simply taking from "A" to give to "B," and so far as "A" is concerned the injustice would be no greater if the amount exacted were given to "C" with whom he has no relation whatever.

But if we are logically to follow the theory that "A," the employer, must pay to "B" the employe at least as much as "B" needs to support him in comfort because of the relation between "A" and "B," then it must be that "A" owes some special obligation to "B," in addition to the contract of employment, and that the state has a right to enforce this obligation. But surely the relation between "A" and "B" is mutual. Therefore, if some obligation of "A" *outside* the contract, can be enforced, "B's" obligations *inside* the contract ought to be enforced. "B" has agreed to give his services faithfully to the work in hand; he has agreed to give "A" consideration in work for the wages; and if "A" is to be required to pay a publicly fixed compensation for the service, then "B"

ought to be required to give a publicly fixed service for the compensation. If "B" can complain to some commission that "A" does not pay him decent wages, then "A" ought to be able to complain to the same commission that "B" does not render him decent service. But it may be said that "A" can discharge "B." And so he can, and, in this respect, they are merely equal, for "B" can quit. The Minimum Wage law, however, undertakes to govern their conduct while the relation of employer and employe continues. Indeed, it begins to govern before the employment is made. But, in fact, it only governs "A's" conduct and leaves "B" free to do as he likes. In other words, this law requires "A" to pay a certain wage if he employs "B," but does not require "B" to do anything whatever for the wage. This analysis shows what a tangled web we weave when we undertake to meddle in purely private affairs.

Second. I dispute the proposition of appellants that if a certain minimum wage is necessary to conserve the health, morality and general welfare of the worker that wage can be exacted by law from the employer, for another reason, and that is that it is the *public* welfare and not purely *private* interest with which the police power is concerned. The general principle running through all the decisions, upholding the exercise of legislative power in derogation of private rights or private property, is the greater concern, the paramount interest of the public. It is only incidentally that the individual becomes a factor. For example, in the interest of the public health, morals or safety certain corporations may be forbidden to relieve themselves by contract from liability for their negligence. So the use of private property may be regulated, as in the case of safety appliances, sanitation, and wholesome surroundings. So the

state may even incidentally injure or destroy private property if the same is dangerous to public health. So the state may forbid both men and women to work in certain employments more than ten hours a day; or in hazardous places for a less period or for any period at all. But all these things are done in the public interest and only incidentally for the benefit of the individual workman. Indeed, the worker may oppose the regulation and prefer to work the longer hours, or in the unsafe place because of the attractive wages to be earned. But his right and the right of the employer must yield to the greater interest of the public. But an act which simply fixes the wages the employer shall pay on the professed theory that the minimum wage is for the public welfare, is solely to give a benefit to one at the expense of another, in which there is no interest except a private one. This distinction, I believe, is fundamental, and must be maintained, unless many cases of this Court are to be overruled, and financial inequalities are to be removed by legislation in this country upon the theory that the public health and the public morals require a more equal distribution of wealth.

Third. I deny the proposition that if a certain minimum wage is necessary to conserve health, morality and general welfare of the worker, that wage can be exacted by law from the employer in the exercise of the police power, because legislation of this character lies entirely outside the domain of police power and can not be brought within it. The whole trouble with the contention of appellants, I respectfully submit, is that they fail to distinguish between legislative discretion and legislative power. They first assume that the fixing of wages is a proper subject for legislation in the exercise of the police power, and then they undertake to show that the

law under discussion is reasonable and not wanton or spoliative. It is true that freedom of contract and the rights of property may be restricted in the paramount interest of the public welfare; but, as this Court said in *Coppage* vs. *Kansas* (236 U. S. 1.), "the mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare' and treated as a legitimate object of the police power, for such restriction is the very thing that is inhibited by the amendment."

In the last analysis wage-fixing statutes not only have no relation to the public welfare as understood in all discussions of the police power, but they amount merely to the taking of one man's property and giving it to another, without any assurance whatever of a just return. The Fifth Amendment, we may pertinently recall, not only guarantees the citizen against a deprivation of his life, liberty or property without due process of law, but expressly forbids the taking of private property for public use without just compensation. The framers of the Constitution were probably unable to foresee, or were unwilling to believe, that any one would suggest the taking of private property for a *private* use without just compensation. But if they did they provided against such a contingency by the declaration that "the enumeration in the Constitution of certain rights shall not be considered to deny or disparage others retained by the people." (9th Amendment.)

Fourth. I particularly dissent from the proposition involved in the minimum wage law for women, which is now before the Court. And in this connection I call the Court's attention to the striking and remarkable fact that this minimum wage law for women in the District of Columbia goes farther, and in a wholly different direction from any other law of a similar character. It differs in a most radical way from the Oregon statute, which has

been before this Court, and upon which practically all others of a like nature are based. The Oregon statute, which had also to do with hours of service and sanitary conditions, provided, with respect to wages, that—

> "It shall be unlawful to employ women in any occupation within the state of Oregon for wages which are inadequate to supply the necessary cost of living, and to maintain them in health,"

with provision for a commission to fix standards and administer the law. The District of Columbia act provides for the creation of a board which is authorized and empowered to ascertain and declare "what wages are adequate to supply the necessary cost of living to any such women workers to maintain them in good health, *and to protect their morals.*" The board is then authorized to conduct an investigation to find out if women in any occupation are receiving wages inadequate to supply them with the necessary cost of living and maintain them in health *"and protect their morals."* And after such investigation the board shall fix the standard, make its order, and any employer in the District of Columbia who fails to pay the wages found by the board as necessary to maintain his women employes in good health *and protect their morals,* is guilty of a crime, and may be fined and sent to jail.

Now, it is claimed by counsel for appellants that in view of the relation between the employer and the employe, it is not unreasonable to require that the employer shall insure to the woman worker, out of the conduct of his business, at least enough to support life and health, and that if the business cannot afford such wages it ought to cease to operate. Of course, such a contention overlooks the whole guaranty of freedom of

contract, and the rights of private property. But the statute under review goes further than this. It requires that the employer shall pay something more than a living wage (whatever that is), and shall contribute, in addition to compensation for labor performed, whatever is necessary to protect the morals of the worker.

Surely there is nothing in a contract of employment which makes the employer responsible for the morals of his employes outside the scope of the employment. I suggest, in deference, that while the denial to women of the right to make their own contracts, and to determine for themselves what compensation they want for their labor, is a reflection upon their intelligence, a statute which requires that despite their own wishes in the matter, women must be paid in addition to wages sufficient for their support, something to protect their morals, is more than a mere reflection upon their intelligence. And I submit that if women do need such protection (a suggestion which, in their name, I resent) it cannot be supplied by the appropriation of private property. If there were no other element in this case this one feature would render the act void.

VI

In All the Decisions of this Court, from Munn vs. Illinois to Wilson vs. New, there is no Authority Sustaining such a Statute as that Involved in this Case.

Coming now to a discussion of the decisions of this Court, in so far as they touch, directly or indirectly, the legislative power to fix wages, either minimum or maximum, either for men or for women, I think we are clearly justified in asserting that in the entire line of such cases,

from *Munn* vs. *Illinois* (94 U. S. 113) to *Wilson* vs. *New* (243 U. S. 332) there is no authority which would support the constitutional validity of the act involved in this case. Nor is there to be found any such authority in any appellate court, federal or state, beyond those which rest upon the one decision from Oregon which came to this Court, and was disposed of by an equal division. *Stettler* vs. *O'Hara* (245 U. S. 629; 69 Ore. 519).

On the other hand, wherever the question has arisen or has been discussed, either in the state or federal appellate courts, or in this Court, the condemnation of such laws, as contrary to the guaranties of the Constitution, has been uniformly declared in clear and unequivocal language.

I want to run over very briefly a summary of the opinions of this Court in which the constitutional validity of wage-fixing statutes was considered, referred to, or, suggested.

In *Frisbie* vs. *United States* (157 U. S. 160) this Court in sustaining an act limiting compensation for obtaining a pension on the ground that the pension is a public bounty, and conditions may be attached to its payment, says (p. 166):

> "The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, service or property."

In *Allgeyer* vs. *Louisiana* (165 U. S. 578) this Court, quoting an earlier decision, said:

> "The main proposition advanced by defendant is that his enjoyment upon terms of equality with all others in similar circumstances, of the privilege

> of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, is an essential part of his rights of liberty and property as guaranteed by the Fourteenth Amendment. This Court assents to this general proposition as embodying a sound principle of constitutional law."

In *Adair* vs. *United States* (208 U. S. 161), the Court in holding that Congress was without power to forbid interstate railroads to discharge an employe because of his membership in a labor union says, speaking through Mr. Justice Harlan:

> "The right of a person to sell his labor upon such terms as he deems proper, is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it * * *. In all such particulars the employer and the employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

In *Coppage* vs. *Kansas* (236 U. S. 1). The Court (by Mr. Justice Pitney) said:

> "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial empairment of liberty in a long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other

> honest way to begin to acquire property save by working for money."

In *Bunting* vs. *Oregon* (243 U. S. 426) this Court upheld an hours of service law in Oregon, but pointed out with emphasis, that the conclusion rested upon a finding that the law was not to be considered a wage law.

In *Wilson* vs. *New* (243 U. S. 332), the Adamson law was upheld as a statute fixing an eight-hour day for railroad employes, and temporarily continuing existing wages until the parties could agree. Here the Court makes it perfectly clear that wage fixing in general would be forbidden by the Constitution, saying, at page 347:

> "The right to fix by agreement * * * a standard of wages * * * is primarily private. The establishment and giving effect to such an agreed-on standard is not subject to be controlled or prevented by public authority."

In *Ft. Smith & Western R. R. Co.* vs. *Mills* (253 U. S. 206), a later Adamson law case, the Court held that where employers and employes had actually agreed upon wages there could be no interference with their agreement.

In *Timber Co.* vs. *Washington* (243 U. S. 219) involving the workman's compensation law of the state of Washington, Mr. Justice Pitney, delivering the opinion of the Court, significantly points out that if a certain section (4) of the act involved, making it unlawful for the employer to deduct any part of the premium he was required to pay from the wages of his workmen, should be construed so as to prohibit employers and employes

> "In agreeing upon wages * * * from taking into consideration the fact that the employer was a contributor to the state fund * * *. It would

> be open to serious question whether, as thus construed, it did not interfere to a constitutional extent with their freedom of contract."

And finally stated that on familiar principles the Court would not assume, in advance, that such "a construction will be adopted as to bring the law into conflict with the federal Constitution."

In *Prudential Insurance Co.* vs. *Cheek* (149, Oct. Term, 1922) the Court, in construing a Missouri statute requiring corporations doing business in that state to give employes quitting their service, a letter showing reasons for the termination of employment, and upholding it as a reasonable exercise of the police power, says:

> "The Missouri statute interposes no obstacle or interference as to either the making or the determination of contracts of employment, and prescribes neither terms nor conditions."

And again:

> "It does not prevent the corporation from employing whom it pleases on any terms that may be agreed upon."

But as to all these expressions of the Court, although clearly indicating a consistent view extending over a long period of years, that the price of labor, or the amount of wages cannot, conformably to the Constitution, be established by law, at least, as a permanent policy, and with respect to private business or the ordinary occupations of life; and although it would seem clear that in certain of these cases the statute would have been held invalid by the Court, as forbidden by the Constitution, except for the fact that it was found not a wage fixing enactment in private industry, it may nevertheless be

claimed that these are mere *obiter dicta*, and that the exact question presented in the case at bar has not been decided. My answer is that while it is true that no law, either of Congress or a state, fixing wages in the ordinary occupations of life, has ever been directly adjudged to be unconstitutional by the Court, if a statute of this character should now be upheld the plain effect would be to reject the distinctions and overrule the reasoning of practically every case just cited.

In *Wilson* vs. *New*, for example, the whole support of the act rested upon the assumption that it was a temporary measure and continued existing wages, dealing with a business impressed with the public interest, and then only to be defended on the ground that the parties themselves could not agree, the Court emphatically stating that even as to the pay of workmen on interstate railroads the right exists in the employers and employes "to agree as to a standard of wages free from legislative interference"; and, further, that the establishment of such agreed on standard "is not subject to be controlled or prevented by public authority."

In *Coppage* vs. *Kansas*, *supra*, it was contended that the act making it a criminal offense for an employer to prescribe, as a condition of employment, that the employe shall agree not to become or remain a member of a labor union, was a valid exercise of the police power of the state, because, as stated by the Kansas Supreme Court, "employes, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract for the purchase thereof." The claim was, in effect, that labor unions ought to be encouraged because they assist their members to get better wages. But the Court held that the freedom of contract could not be struck down

on any theory of leveling inequalities of fortune. Now it is hard to say what the controversy in the Coppage case was about, if the State of Kansas could have simply fixed the wages of the employes at whatever the labor unions demanded, or a public commission thought would satisfy the requirements of the situation. To hold that the state may not require special safeguards for labor organizations in the making of contracts between employers and employes on the ground that such organizations tend to strengthen the financial independence of the employe, and yet to contend that the state *may itself* remove financial inequalities by writing the contract between the employer and the employe, and fixing the wages therein, is simply to say that the state may do *directly* what it cannot do *indirectly*.

VII

Where this Sort of Legislation Will Lead

In testing the constitutionality of any legislative act we have the right to inquire, as this Court did, in *Adair* vs. *United States* (208 U. S. 161); *Coppage* vs. *Kansas* (236 U. S. 1); *Truax* vs. *Raich* (239 U. S. 33, Justice Hughes); *Truax* vs. *Corrigan* (257 U. S. 312, Chief Justice Taft), and the late case of *Bailey* vs. *Drexel Furniture Co.* (657, Oct. Term, 1921, Chief Justice Taft), to what distance and in what direction the departure from familiar standards may lead us, and what precedents may be established by sustaining the power claimed, which may be cited hereafter as authority for further legislation, of wider scope or more extended character.

This Court, speaking through the Chief Justice in *Truax* vs. *Corrigan*, supra, said:

> "Classification like the one with which we are here dealing, is said to be the development of the philosophic thought of the world, and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual."

And, again, in the Child Labor Tax case, the Chief Justice, delivering the opinion of the Court, said:

> "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards."

In *Boyd* vs. *United States* (116 U. S. 616, 633) the Court put the proposition thus:

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches, a slight deviation from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed * * *. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon."

Now, it must be perfectly obvious that if the state or the nation, despite the Fourteenth and Fifth amendments may fix the wages of women, they may fix the wages of men.

Muller vs. *Oregon* (208 U. S. 412), although it sustained hours of service laws (a legitimate exercise of the police power) as applied to women only, and although

the argument was strenuously made that this case need not necessarily support a similar law for men, *Muller* vs. *Oregon* was followed by *Bunting* vs. *Oregon* (243 U. S. 426), in which an hours of service law (and again very properly we think) was upheld as applied to men. It is interesting to note further that in *Bunting* vs. *Oregon*, supra, the same counsel who appears today for the Minimum Wage Board was careful to say in his brief "The law is an hours law, not a wage law," etc., and yet upon the authority of similar statutes he is contending now that a wage law should be upheld. In the brief filled in this case by the Assistant Attorney General of Kansas, a recent decision is cited (*Court of Industrial Relations* vs. *Charles Wolf Packing Co.*, 109 Kas. 643) in which the Supreme Court of that state holds that wage fixing for men is fully justified by authorities upholding wage fixing for women.

And yet here today the proposition is seriously urged that considerations of her life and morals make a minimum wage law for women necessary and desirable upon principles which would not support a minimum wage law for men. I submit that such an alleged distinction is unreal and fanciful. In all the extracts covering hundreds of pages of appellant's brief, from students, social economists and philanthropists who believe in introducing, as a practical system of government, the theory of the so-called "living wage," there is scarcely the slightest hint anywhere of a distinction between men and women. All the writers on the subject, all the pioneers in the movement of a few years ago, whose testimony is marshaled by the appellants as indicating the support of public opinion for such laws, believe in minimum wage laws for both men and women; and the purely doctrinaire opinions given take no note whatever of constitutional

inhibitions under our form of government. For example, one of the best known (cited at page 419 of appellant's brief), a man of the highest reputation for good works and humanitarian sympathies, declares that every workman's wages "ought to be sufficient to maintain him in reasonable and frugal comfort * * * as determined by man's nature and needs"; and that the best way of effecting this is "the establishment by law of minimum rates of wages that will equal or approximate the normal standards of living for the different groups of workers."

So the Health Commissioner of the District of Columbia (Dr. W. C. Woodward, appellant's brief, p. 390), whose statement was procured by the advocates of this legislation for the purpose apparently of showing that the minimum wage is peculiarly necessary to protect the health and morals of women, says:

> "That there is a very definite relation between wages and health, and between wages and morals, I think will be conceded by every one who at any time has had to earn his own living, and who has even the slightest knowledge of hygiene or health. We know that in any organized community we cannot get ordinary shelter without paying for it; that to clothe the body costs money; that provision for ordinary protection against illness requires money, etc. * * * It stands to reason, therefore, that inadequacy of wage means either of two things: on the one hand, it may mean inadequacy of shelter, inadequacy of clothing, inadequacy of food * * * or, on the other hand, it means that from some source or other the wage must be supplemented with possible resort to wrongdoing to accomplish that end. I am very loath, however, to connect up minimum wages with moral questions. The most I care to say is that when one is tempted the lack of physical stamina and the necessity for maintaining life, increase the weight of the inducement and certainly make yielding easier."

If there is anything in that obvious and indisputable statement which applies to women and does not apply to men, it is certainly difficult to point it out.

If your honors please, a compulsory minimum wage established for either men or women, or for both, is but an initial step in the direction of price fixing generally. Indeed, to make effectual for any purpose a minimum or a living wage, it is absolutely essential ultimately to fix the prices of all commodities, of all property and service of whatever nature. Unless we can regulate the price of everything in the way of private business and private occupation, we cannot beneficially regulate the price of anything. If there is once established as a permanent policy of government, a minimum wage, based upon the cost of living, then, unless all the factors entering into the cost of living, such as rent, the price of land and houses, clothing, food, medicines and recreations are fixed by law the whole machine will run on one wheel. It will do a working woman no good to require her employer to pay her at least $16.50 a week if her landlord can take it all from her in rent; or if the boarding-house can take it all from her for her board.

The opinion of the Court below in the present case well states this principle as follows:

> "If the power * * * exists to fix wages in the interest of good morals, and the protection of the general welfare, the power must likewise be conceded to fix the prices of all commodities entering into the determination of an equitable wage. In no other way can justice be accorded. The wage fixed for the employer to pay his employe cannot be justified if based upon the unrestrained prices which the employe may have to pay the merchant for food and clothes, or the landlord for rent. The logical result

> of such a course relegates the whole matter of prices to the realms of legislation."

It is too old a truth to need repeating that if the price of one commodity is regulated by law, and the price of all other commodities is fixed by competition in the open market, the regulated commodity will suffer. If Congress, assuming the power, fixed the price at which all the farmers in the land would be required to sell their potatoes, and the price of every other product of the farm was controlled by the law of supply and demand, the farmers would simply quit raising potatoes, unless the price fixed by law was made above that obtainable for other products. And in that case the people would quit eating potatoes.

There is no escaping the conclusion that the fixing of wages by law is a step in the direction of price fixing generally, and the one cannot be accomplished without justifying the other. Price fixing means the control of all private industry by the state, and the control of all industry means government ownership, and government ownership means the leveling of all men and women to an industrial army working for the state—and then production ends. This was the experience of Russia. A distinguished American communist who went to Russia shortly after the revolution on a mission of fraternal interest and sympathy, came home cured of his previous beliefs. In the course of a public address he stated that he had seen both the capitalistic and communistic forms of government in operation, and his judgment, expressed in his own words, was this:

> "I have come to the conclusion that I would rather live under a government in which there is an unequal enjoyment of plenty, than under one in which there is an absolutely impartial distribution of nothing."

VIII

CONCLUSION

Now, in a final word, I submit, earnestly and respectfully, that if profound changes are to be made in our system of government, changes which, if once embarked upon, would lead to paternalism in the highest degree, and destroy the one great principle, peculiarly American, that the state exists for the citizen and not the citizen for the state, such a change ought to be frankly and avowedly adopted by constitutional amendment and not by insidious encroachments upon personal freedom in response to some passing fancy for innovations.

The Constitution of the United States is not graven on tables of stone that must be broken in order to be amended. It is written on paper like any other modern contract, and the parties to it may alter the terms whenever they desire.

In view of our experience as a people, in the last decade of political history in this country, it seems peculiarly inappropriate and unjustifiable to be pressing the legislative bodies and the courts to strain or stretch the Constitution so as to accommodate social experiments forbidden by its terms, or contrary to hitherto accepted standards of interpretation. During the last ten years, and since the beginning of this movement for minimum wage laws, now subsiding, the Constitution of the United States has been amended four times. The Sixteenth (income taxes), Seventeenth (election of Senators), Eighteenth (prohibition), and Nineteenth (woman suffrage) articles have been added; and two more amendments (for federal control of child labor and advancing the date for coming into office of the new president and the new congress) are in their initial

stages. The people have learned that the organic law of the land may be quite readily and expeditiously amended whenever there is a strong general sentiment in favor of a change.

Now, as between the two methods of amending the Constitution in the way ordanied by the people, on the one hand, or gradually wearing away its guaranties and safeguards by the "silent approaches," slight deviations and "stealthy encroachments" so often condemned by this Court, on the other hand, the amendment is always to be preferred, and for these patent reasons:

First. It means the vindication and acceptance of existing law and inculcates among the people a respect for orderly procedure.

Second. It affords an opportunity for all the citizens of all the states to debate the question proposed. In the concrete matter here involved, if the advocates of the minimum wage for women were obliged openly to submit their proposal as an amendment to the Constitution, all the women of the land, and particularly the millions of women who are now wage earners, would have an opportunity to be heard. There was this opportunity when women were given the right to vote. And now, although women have since secured the right of suffrage, when it is still proposed in several of the states and here in the capital of the nation, that women shall be denied the right to make their own contracts for their own wages, contrary to the long-accepted principles of the Constitution, it would seem far better, in the interest of good government, to make that change, if it seems desirable, by an open and frank amendment of the Constitution rather than by gradually fastening it upon the country through legislative enactments.

Third. When the people amend their Constitution they do it to the extent necessary to effect the object

desired, and they leave the balance of the instrument unimpaired. Thus, if there is a sufficient public sentiment in this country to inaugurate a system of minimum wages for women, that express and specific authority may be incorporated in the organic law, while wage laws for men, and price fixing generally, will still be forbidden as inconsistent with the general American doctrine of the liberty of the individual and the security of private property. But if the Courts relax the limitations of the Constitution in order to admit novel expedients, in response to some temporary demand, the precedent established becomes an authority for further advances until all restraints are swept away. When the people amend their Constitution they may authorize an exception; when the Courts abate its fixed principles they establish a rule.